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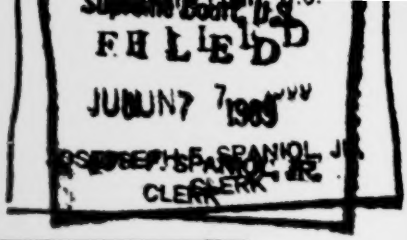

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT DAVIS, VIRGINIA DAVIS, WILLIAM DAVIS, DYNAMIC GENES, INC., a Delaware corporation, f/k/a BIG D SEED CO., a Delaware corporation, DAVIS HYBRID CORN CO., and DAVIS SEED FARMS,

Petitioners,

vs.

FIRST NATIONAL BANK OF WESTVILLE, a National Banking Association and FIRST NATIONAL BANK OF DANVILLE, a National Banking Association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Do the anti-tying provisions of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. §1972(1), require a plaintiff to show an "anti-competitive effect" or lessening of competition in the anti-trust sense contemplated by the Sherman and Clayton Acts in order to recover?

PARTIES IN THE COURT BELOW

Petitioners Robert Davis, Virginia Davis, William Davis, Dynamic Genes, Inc., Davis Hybrid Corn Co., and Davis Seed Farms were the Plaintiffs-Appellants in the court below. Respondents First National Bank of Westville, Illinois and First National Bank of Danville, Illinois were the Defendants-Appellees below.

TABLE OF CONTENTS

	Page
Parties in the Court Below	ii
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. The Decision Below, Holding That a BHCA Plaintiff Must Show an "Anti-Competitive Effect" or Lessening of Competition in the Sense of the Sherman and Clayton Acts, Conflicts With the Decisions of Other Courts of Appeals	6
II. The Decision Below Raises a Significant and Increasingly Recurring Problem Respecting the Construction and Application of a Bank Regulatory Statute and Presents and Important Question of First Impression in This Court	14
Conclusion	20
Appendix A	A-1
Appendix B	A-9
Appendix C	A-12
Appendix D	A-50

TABLE OF AUTHORITIES

Page

Cases:

American Federation of Musicians v. Wittstein, 379 U.S. 171 (1964) 19

Avco Corp. v. Aero Lodge, 735, 390 U.S. 557 (1968) ... 19

BC Recreational Industries v. The First National Bank of Boston, 639 F.2d 828 (1st Cir. 1981) 9

Bruce v. First Federal Savings and Loan Association of Conroe, Inc., 837 F.2d 712 (5th Cir. 1988) 6,7,8,18

Clark v. United Bank of Denver National Association, 480 F.2d 235 (10th Cir. 1983) 9

Costner v. Blount National Bank, 578 F.2d 1192 (6th Cir. 1978) 9,10,14,18

Duryea v. Third Northwestern National Bank, 606 F.2d 823 (8th Cir. 1979) 9

Exchange National Bank v. Daniels, 768 F.2d 140 (7th Cir. 1985) 10,11,12

Fortner v. United States Steel, 394 U.S. 495 (1969) 17

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 8

McCoy v. Franklin Savings Association, 636 F.2d 172 (7th Cir. 1988) 9,13

Midstate Fertilizer Co. v. Exchange National Bank of Chicago, et al., No. 88-2532 12

Nordic Bank PLC v. Trend Group Ltd., 619 F.Supp. 542 (S.D. N.Y. 1985) 9

Northeastern National Bank v. United States, 387 U.S. 213 (1967) 19

Parsons Steel Inc. v. First Alabama Bank of Montgomery, 679 F.2d 242 (11th Cir. 1982) ...7,10,12,13,14,18

Rubin v. United States, 449 U.S. 424 (1981) 14

Swerdloff v. Miami National Bank, 584 F.2d 54 (5th Cir. 1978) 9

Tose v. First Pennsylvania NA, 648 F.2d 879 (3rd Cir. 1981) 9

TVA v. Hill, 437 U.S. 153 (1978) 19

United States v. American Trucking Associations, Inc., 310 U.S. 534 (1940) 14

United States v. Crawley, 837 F.2d 291 (7th Cir. 1988) .. 11

United States v. Ruzicka, 329 U.S. 287 (1946) 19

Weit v. Continental Illinois National Bank and Trust Co., 641 F.2d 457 (7th Cir. 1981) 18

Statutes:

28 U.S.C. §1254(1) 2

12 U.S.C. §1464(q)(1) 7

12 U.S.C. §1972(1) 2,3,4,6,7,10,11,12

12 U.S.C. §1975 3

15 U.S.C. §1 et seq. (1980) 8

15 U.S.C. §14 10

Miscellaneous:

2 Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law,* 1410 (tent. ed. 1958) 18

DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State,* 72 Va.L.Rev. 399 (1986) .. 17,19

Naegele, *The Anti-Tying Provisions: Its Potential is Still There,* 100 Banking Law Journal 138 (1983) .. 10

Posner, *The Federal Courts: Crisis and Reform* (1985).. 18

Senate Report No. 91-1084, reprinted in 1970 U.S. Code Cong. & Admin. News 5519.....6,9,14,15,16

Senate Report No. 536, reprinted in 1982 U.S. Code Cong. & Admin. News 3071..... 7

Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 Iowa.L.Rev. 195 (1983) 19

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OCTOBER TERM, 1988

ROBERT DAVIS, VIRGINIA DAVIS, WILLIAM DAVIS,
DYNAMIC GENES, INC., a Delaware corporation,
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DAVIS HYBRID CORN CO., and DAVIS SEED FARMS,

Petitioners,

vs.

FIRST NATIONAL BANK OF WESTVILLE,
a National Banking Association and
FIRST NATIONAL BANK OF DANVILLE,
a National Banking Association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Robert Davis, Virginia Davis, William Davis, Dynamic Genes, Inc., Davis Hybrid Corn Co., and Davis Seed Farms respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 1989.

OPINIONS BELOW

The opinion of the court of appeals (App. A, A-1 - A-8) is reported at 868 F.2d 206 (7th Cir. 1989). The February 18, 1988 opinion of the district court (App. B, A-9 - A-11) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 26, 1989. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 9, 1989. This petition for certiorari is being filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

STATUTES INVOLVED

A. The Anti-Tying Provisions of the Bank Holding Company Act Amendments of 1970 (BHCA), 12 *U.S.C.* §1972(1) provide as follows:

> "(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit."

The board (of Governors of the Federal Reserve System) may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this section.

B. 12 *U.S.C.* §1975, entitled Civil actions by persons injured: jurisdiction and venue; amount of recovery, provides

"Any person who is injured in his business or property by reason of anything forbidden in subsection (b) [12 *U.S.C.* §1972(1)] may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The dispute in this case centers on the requirement imposed by the Respondent banks that the Petitioners, as a condition of borrowing more money from the banks, liquidate their business within sixty days of such borrowing. (App. A-2). The Petitioners, individual shareholders and principals in a family owned seed corn business, had been customers of the Respondent

banks since 1977. (App. A-2). During that time, they had borrowed substantial sums of money and had executed a number of notes payable to the banks. (App. A-2). They had never been in default. (App. A-50). In late, 1984 or early 1985, the Petitioners needed an additional $200,000 for the operation of their business. (App. A-2). The banks agreed to lend them that sum of money, but only on the condition that the Petitioners would liquidate their business within sixty days of the borrowing of any money. (App. A-2). On June 28, 1985, the Petitioners executed a loan agreement, the twelfth paragraph of which required them to enter into a contract to sell their business by September 1, 1985. (App. A-2, A-46 - A-49). Petitioners failed to enter into such a contract and the Respondent banks forced the Petitioners to cease business and ultimately, on February 14 1986 to sell their business. (App. A-2).

In December, 1986, Petitioners filed suit in the United States District Court alleging that the Respondent banks' requirement that the Petitioners liquidate their seed businesses as a condition of extending further credit to the Petitioners violated the antitying provisions of the Bank Holding Company Act Amendments of 1970 (BHCA), 12 *U.S.C.* §1972(1)(C). That section prohibits the extension of credit on the condition or requirement that the bank customer "provide some additional . . . service to the bank, other than those related to and usually provided in connection ith a loan, discount, deposit, or trust service." The district court granted summary judgment to the Respondent banks. The district court concluded first that since the banks had not precluded the Petitioners from borrowing money from another bank to pay off the Respondents, the banks had not violated §1972(1)(C). The district court held in that respect that section 1972 is "intended to prohibit anticompetitive banking practices, practices that attempt to prevent customers from dealing with other banks." (App. A-10). Second, the district court concluded that since the Respondent banks "did not receive anything from the (Petitioners) except

repayment of the loans'' (App. A-10 - A-11), the requirement imposed by the banks was a traditional banking practice designed to protect the banks' investment. *Id.*

The court of appeals affirmed on the sole ground that the Petitioners had not shown an anti-competitive reciprocity arrangement. (App. A-6). In particular, the court of appeals held that the banks had neither attempted to prevent Petitioners from dealing with other banks, nor used their ''market power over credit to secure business liquidation services at better-than-market terms.'' (App. A-6).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW, HOLDING THAT A BHCA PLAINTIFF MUST SHOW AN "ANTI-COMPETITIVE EFFECT" OR LESSENING OF COMPETITION IN THE SENSE OF THE SHERMAN AND CLAYTON ACTS, CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Section 1972 of Title 12 was enacted to protect bank customers "against the possibility of misuse of the economic power of a bank." Senate Report No. 91-1084, reprinted in 1970 U.S. Code Cong. & Admin. News, 5519, 5535. To accomplish that protection of bank customers, the BHCA proscribes tying [subsections (1)(A) and (B)], reciprocity [subsection (1)(C) and (D)], and exclusive dealing [subsection (1)(E)] arrangements. *Id.* See also *Bruce v. First Federal Savings and Loan Association of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988). As revealed in the legislative history, in particular the supplementary views of Senator Brooke set forth in Senate Report No. 91-1084 at 45 and as reprinted in 1970 U.S. Code Cong. & Admin. News 5519, 5558:

> "Because of their inherent anti-competitive effects, which may operate to the detriment of bank customers as well as banking and nonbanking competitors, tying arrangements involving a bank are made unlawful by this section *without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service.* Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved."

(Emphasis supplied.) The court of appeals in this case quoted and appeared to agree that the foregoing was the thrust of the legislative history. (App. A-5).

But, notwithstanding its agreement that the purpose of BHCA was to "check the economic power of banks" (App. A-4), the Seventh Circuit has here held that the statute is offended only when a plaintiff seeking relief demonstrates that a practice is "anti-competitive." (App. A-5 - A-6). The Seventh Circuit concluded that "anti-competitiveness" could have been shown if the Petitioners had demonstrated that the banks attempted to prevent them from dealing with other banks or that the banks "were attempting to use their market power over credit to secure business liquidation services at better-than-market terms," (App. A-6), and "to *lessen competition*." (App. A-6). (Emphasis in original). Thus, the court of appeals held in this case that the BHCA struck at practices that "traditionally (had) been targets of the anti-trust laws because of their potentially anti-competitive effect." (App. A-4). To hold otherwise, the court of appeals said, "would prohibit banks 'from devising particular methods for protecting themselves against default' and could, in various situations, 'have the undesirable effect of discouraging banks from granting extensions of credit, and thus precipitate foreclosures or bankruptcy' " (App. A-6), quoting *Parsons Steel Inc. v. First Alabama Bank of Montgomery,* 679 F.2d, 242, 245 (11th Cir. 1982).

In so holding, the court of appeals recognized (App. A-6) that its interpretation of 12 *U.S.C.* §1972 conflicted with the interpretation adopted by the Fifth Circuit in *Bruce v. First Federal Savings and Loan Assoc. of Conroe, Inc.,* 837 F.2d 712 (5th Cir. 1988). In *Bruce,* the Fifth Circuit had before it the Thrift Institutions Restructuring Act, 12 *U.S.C.* §1464(q)(1) (TIRA). That statute, enacted in 1982, "was intended to subject federal thrift institutions 'to anti-tying restrictions generally comparable to bank holding companies.' " *Bruce, supra* at 716, quoting S.Rep. No. 536 at 17, reprinted in 1982 U.S. Code Cong. & Admin. News 3071. In construing the scope of TIRA,

the *Bruce* Court concluded that TIRA's anti-tying provisions were based on and identical to BHCA. *Bruce* at 717. The court further observed that the legislative history of TIRA made it clear that TIRA was to be enforced in the same fashion as BHCA. *Id.*

Therefore, the Fifth Circuit in *Bruce* held that in dismissing plaintiffs' complaint on grounds of failing to allege anti-competitiveness,

> " . . . the district court may have reached outside the language of 1464(q)(1) for it requirement of anti-competitiveness. For a tying arrangement to constitute a *per se* violation of §1 et seq. of the Sherman Act, 15 *U.S.C.* §1 et seq. (1980), it must be established (i) that the defendant possesses market power over the tying product to force purchase of the tied product and (ii) that a 'substantial volume of commerce is foreclosed thereby.' *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 13-16 (1984). *The BHCA obviates the need to make these two showings to establish that a bank has engaged in an illegal tying arrangement.*"

Bruce, supra at 718 (emphasis supplied). In addition, the Fifth Circuit in *Bruce, supra,* relied upon the supplementary views of Senator Brooke to the effect that tying arrangements were made unlawful by the BHCA "without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service." *Bruce, supra* at 718 n.10.

No other circuit besides the Fifth Circuit in *Bruce* and the Seventh Circuit in this case has specifically addressed the issue as to whether or not a plaintiff, in order to sustain a claim under the BHCA, must show an anti-competitive practice in the senses contemplated by the general anti-trust laws. However, as pointed out by the court of appeals in this case (App. A-3), other circuits have quoted the language from the legislative

history that the BHCA was intended "only to prohibit *anti-competitive* practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." Senate Banking and Currency Committee Report No. 91-1084, 91st Cong. 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, 5519, 5535 (emphasis added). See for e.g. *Swerdloff v. Miami National Bank,* 584 F.2d 54, 58 (5th Cir. 1978); *Duryea v. Third Northwestern National Bank,* 606 F.2d 823, 825 (8th Cir. 1979); *Tose v. First Pennsylvania Bank NA,* 648 F.2d 879, 897 (3rd Cir. 1981); *McCoy v. Franklin Savings Assoc.,* 636 F.f2d 172, 175 (7th Cir. 1988); *Clark v. United Bank of Denver National Association,* 480 F.2fd 235, 238 (10th Cir. 1983); and *BC Recreational Industries v. The First National Bank of Boston,* 639 F.2d 828, 831 (1st Cir. 1981). However, none of the foregoing decisions specifically holds that as a prerequisite to recovery under the BHCA, a plaintiff must show an anti-competitive effect as contemplated by the Sherman and Clayton Acts.

But, respecting the "anti-competitive" language in the legislative history, the district court in *Nordic Bank PLC v. Trend Group, Ltd.,* 619 F.Supp. 542 (S.D. N.Y. 1985) noted that it was "confusing." *Id.* at 556 n.9. By its analysis, the *Nordic Bank* court said

> "This language notwithstanding, the BHCA does not require a plaintiff to prove that the arrangement in question had an anti-competitive effect. Instead, the BHCA establishes a *per se* rule obviating the need for a specific inquiry into the anti-competitive effect of the prohibitive tie."

Nordic Bank PLC v. Trend Group, Ltd., 619 F.Supp. 542, 556 n.9. In support of that analysis, the district court in *Nordic Bank* cited and relied upon the Sixth Circuit's opinion in *Costner v. Blount National Bank,* 578 F.2d 1192, 1194, 1196

(6th Cir. 1978)[1] and the Eleventh Circuit opinion in *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242, 244-45 (11th Cir. 1982). See also Naegele, *The Anti-Tying Provisions: Its Potential is Still There,* 100 Banking Law Journal, 138, 143 (1983). The Second Circuit has not yet considered the BHCA in a reported opinion. Therefore, the District Court of the Southern District of New York, sitting as it does in a federal judicial district wherein banking is a significant industry, must be considered an important source for determining what a bank regulatory statute requires.

Prior to its decision in this case, the Seventh Circuit in *Exchange National Bank v. Daniels,* 768 F.2d 140 (7th Cir. 1985) had gone a step further than it went in this case and had said with respect to a complaint charging the violation under 12 *U.S.C.* §1972(1)(A) that the anti-tying provisions of §1972 were designed to prohibit practices "that attempt to prevent customers from dealing with other banks." *Exchange National Bank v. Daniels* at 143. On that basis the Seventh Circuit said in *Exchange Bank* that it treated section 1972 "as the banking equivalent of section 3 of the Clayton Act, 15 *U.S.C.* §14." *Id.* The Seventh Circuit's language in *Exchange Bank* may have im-

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[1] In *Costner,* a suit alleging causes of action under both BHCA and the Sherman Act, the court rejected the bank's argument that the Sherman Act claim should not have been submitted to the jury. In so doing, the court said it

> "was unable to see how the bank was prejudiced even if submission of the Sherman Act claim to the jury was incorrect. The bank was also sued under the Bank Holding Company Act, which establishes a *per se* rule and provides the same penalties for tying arrangements as the Sherman Act, *but without the necessity of proving any economic power in the market for the tying product.*"

Id. at 1196 (emphasis supplied. Therefore, the Sixth Circuit said "even if the evidence of market power and effect on interstate commerce were insufficient to warrant submission of the Sherman Act claim to the jury, (any error) was harmless. . . ." *Id.*

pelled, in part, its decision in this case. The district court in this case relied on *Exchange National Bank v. Daniels, supra* for it conclusion that the plaintiffs failed to demonstrate a required anti-competitive effect to sustain their cause of action. (App. A-10).

But, *Exchange National Bank v. Daniels* should have created no imperative respecting what either the court of appeals or the district court should have done in this case. First, the above quoted language from *Exchange National Bank v. Daniels* can refer only to a prohibition under 12 *U.S.C.* §1972(1)(E), prohibiting exclusive dealing whereas the instant case involves a violation under §1972(1)(C), proscribing reciprocity arrangements. Second, the above recited language from *Exchange National Bank v. Daniels* was written in the context of a complaint which alleged a violation of 12 *U.S.C.* §1972(1)(A), a traditional tying arrangement. 768 F.2d at 140. Thus, the language from *Exchange National Bank v. Daniels, supra* stating a prohibition under subsection (1)(E) was altogether unnecessary to the decision that was reached in that case. Accordingly, that language from *Exchange National Bank v. Daniels* could have been regarded by the Seventh Circuit as dicta and thereby not binding for purposes of its decision in this case. See *United States v. Crawley,* 837 F.2d 291, 292 (7th Cir. 1988). Nevertheless, beginning with its decision in *Exchange Bank v. Daniels* and continuing in this case, the Seventh Circuit has embarked on a construction of the BHCA which appears at variance with the plain language of the statute, the legislative history, and the Fifth Circuit, not to mention the fashion in

which the BHCA is being intrepreted in the Southern District of New York and the Sixth and Eleventh Circuits.[2]

The primary rationale for the Seventh Circuit's conclusion that a BHCA plaintiff must show an anti-competitive effect in the general anti-trust sense was provided by its reading of *Parsons Steel v. First Alabama National Bank of Montgomery,* 679 F.2d 242 (11th Cir. 1982). (App. A-6). But, the Eleventh Circuit's decision in *Parsons Steel* does not support the Seventh Circuit's reliance upon it. In *Parsons Steel,* the plaintiff had complained that the bank's requirement that further credit to a troubled subsidiary of the plaintiff be conditioned on the appointment of a bank designated individual as manager of the subsidiary violated §1972(1)(C). In holding that practice did not violate §1972 as a matter of law, the Eleventh Circuit acknowledged "that the purpose and effect of §1972 (was) to apply the general principles of the Sherman Anti-Trust Act prohibiting anti-competitive tying arrangements specifically to the field of commercial banking *without requiring plaintiffs to establish the economic power of the bank and specific anti-competitive effects of tying arrangements . . .*" *Id.* at 245 (emphasis supplied). The reason that the plaintiffs in *Parsons Steel* failed, however, was that they failed to establish that the bank tied the loan to any other bank product, service, or benefit. *Id.* at 246. Rather, the court found "(t)he subsidiary was in financial difficulty and the bank was simply reluctant to grant additional credit." *Id.* The *Parsons Steel* court held that to include within the "unusual banking practice" [12 *U.S.C.* §1972(1)(C)]

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[2] On April 18, 1989, the Seventh Circuit heard oral argument in another Bank Holding Company Act case, *Midstate Fertilizer Co. v. Exchange National Bank of Chicago, et al.,* No. 88-2532. Although the district court had not considered the question of "anti-competitive effect" and the parties had not raised it in their briefs in the Seventh Circuit, a major concern of the Seventh Circuit at oral argument was whether the practice complained of by the plaintiffs was sufficiently "anti-competitive" in the sense set forth in its decisions in this case and in *Exchange National Bank v. Daniels, supra.*

language of the statute the practice complained of "could have the undesirable effect of discouraging banks from granting extensions of credit and thus precipitate foreclosure or bankruptcy." *Id.* at 245.

Therefore, the entire focus of the court's ruling in *Parsons Steel* was on whether the practice complained of was an unusual banking practice, not whether there were specific adverse effects on competition or a lessening of competition. Consequently, the language from *Parsons Steel* relied upon by the court of appeals in this case to support an "anti-competitive effect" requirement was intended by the *Parsons* court to relate to the nature of the practice, i.e. whether or not it was unusual within the scope of the statute.

Furthermore, the Seventh Circuit's requirement in this case that a BHCA plaintiff demonstrate an anti-competitive effect lest the BHCA be construed as "discouraging banks from granting extensions of credit, . . . thus precipitating foreclosures or bankruptcy," had already been addressed by the Seventh Circuit in *McCoy v. Franklin Savings Association,* 636 F.2d 172 (7th Cir. 1988). Therein, the court indicated a defendant bank might have a defense under the BHCA if the banking practice in question was founded on "genuine business need." *McCoy, supra* at 175. The *McCoy* approach would permit a bank to fashion creative conditions upon the extension of credit where the economic or business circumstances so required. That approach would certainly permit banks to take necessary measures to protect their investments, protect against default and at the same time, deal fairly and reasonably with the bank customer which is the essential aim of the anti-tying provisions of the BHCA. None of those objectives is furthered one way or the other by requiring a plaintiff to recover under the BHCA to show an anti-competitive effect in the general anti-trust sense under the Sherman and Clayton Acts. To so require, simply inhibits a plaintiff's ability to gain the protection intended by Congress "against the possibility of misuse of the economic

power of a bank." Senate Report No. 91-1084, reprinted in 1970 U.S. Code Cong. & Admin. News, 5519, 5535.

The direct conflict between the Fifth and Seventh Circuits justifies the grant of certiorari to review the judgment below. Additionally, the conflicting approaches between the Seventh Circuit in this case and those of the Eleventh Circuit in *Parsons Steel, supra* and the Sixth Circuit in *Costner v. Blount National Bank, supra* further demonstrate the need for guidance from this Court on whether a BHCA plaintiff must show an "anti-competitive effect" in order to recover.

II.

THE DECISION BELOW RAISES A SIGNIFICANT AND INCREASINGLY RECURRING PROBLEM RESPECTING THE CONSTRUCTION AND APPLICATION OF A BANK REGULATORY STATUTE AND PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION IN THIS COURT.

As this Court held in *United States v. American Trucking Associations, Inc.*, 310 U.S. 534 (1940), "(t)here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Id.* at 543. This Court said in *American Trucking Associations* that frequently the words of a statute "are sufficient in and of themselves to determine the purpose of the legislation." *Id.* In those situations, this Court has "followed their plain meaning." *Id.* This Court further said in *Rubin v. United States*, 449 U.S. 424, 430 (1981) that "when we find the terms of a statute unambiguous, judicial inquiry is complete. . . ." It is only when the meaning of the language of a statute "has led to absurd or futile results," *American Trucking Associations* at 543 that "this Court has looked beyond the words to the purpose of the act." *Id.*

Nowhere do the anti-tying provisions of the Bank Holding Company Act Amendments of 1970 use the term "anti-competitive" or any other term evoking that concept. The absence of the term "anti-competitive" or any other language intimating "anti-competitive effect" is consistent with what the legislative history demonstrates to be the purpose of the statute. See supplementary views of Senator Brooke *supra,* 1970 U.S. Code Cong. & Admin. News at 5558. The only reference to the "anti-competitive" concept is the language appearing in the legislative history which says that "the purpose of this provision is to prevent anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire."[3] That language appears in both Senate Report No. 91-1084 as reprinted in 1970 U.S. Code Cong. & Admin. News at 5535 and in the supplementary views of Senator Brooke as reprinted *Id.* at 5558.

But, that language cannot have been intended to convey the meaning that a plaintiff is obliged to show an anti-competitive effect in order to succeed under the statute. That fact is made clear by the respective positions of Senators Bennett, Tower, Percy, Packwood, and Goodell on the one hand and Senator Brooke on the other. Senators Bennett, Tower, Percy, Packwood, and Goodell all had reservations about the scope of the statute. 1970 U.S. Code Cong. & Admin. News at 5546. For example, Senator Goodell didn't feel the anti-tying provisions ought to be in the BHCA Amendments in the first place. *Id.*

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[3] The use of the relative pronoun "which" in the Senate Banking and Currency Committee's report in a clause that provides additional information (require bank customers to accept or provide some other service or product) about the antecedent (anti-competitive practices) shows that all Congress meant by the term "anti-competitive practices" was the requirement imposed on bank customers to obtain or provide some other product or service. See American Heritage Dictionary of English Language, p. 1459 (1973).

Senators Bennett, Tower, Percy, and Packwood complained that the Act made certain bank practices *per se* a violation of the law whether or not there was any anti-competitive effect. *Id.* Those senators argued that many legitimate practices, including requirements of compensating balances and correspondent banking relationships and other practices would be outlawed by virtue of the statute. *Id.* at 5547.

However, Senator Brooke responded to those concerns by saying that the statute would not in fact infringe on customary banking practices. *Id.* at 5558. Senator Brooke stressed that notwithstanding the concerns of the other senators, there was to be no necessity for a showing of adverse competitive effects under the anti-tying provisions of the BHCA. *Id.* In so saying, Senator Brooke relied upon the views expressed in a letter dated June 26, 1970 to him from Richard McLaren, Assistant Attorney General of the Anti-Trust Division of the Justice Department. That letter is included in the legislative history, *Id.* at 5560-5561. Based on Assistant Attorney General McLaren's letter, Senator Brooke indicated that the prohibited practices were "*inherent(ly) anti-competitive.*" Supplementary views of Senator Brooke, 1970 U.S. Code Cong. & Admin. News at 5558 (emphasis supplied).[4]

Senator Brooke further relied on Assistant Attorney General McLaren's letter in observing that the anti-tying provisions of the Bank Holding Company Act Amendments were designed to go beyond what the Supreme Court had, prior to the enactment

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[4] In views published in the Congressional Record, Senator Brooke was even more explicit. He explained that "*per se* illegality arises (under the BHCA) where either expressed or implied coercion is involved." 116 Cong.Rec. 42432 (1970). On that basis, Senator Brooke said "where the totality of the circumstances indicates that the customer has not voluntarily entered into the transaction but rather has been induced into doing so through coercion, either expressed or implied, the conduct under consideration is actionable under (the BHCA)." *Id.*

of the BHCA in 1970, held respecting tie-ins in *Fortner v. United States Steel,* 395 U.S. 495 (1969). Therein the Court had affirmed its line of decisions to the effect that to successfully challenge a tying arrangement, a plaintiff was obliged to show that a defendant had sufficient economic power with respect to the tying product to restrain free competition in the market for the tied product. McLaren said that the then pending anti-tying provisions of the Bank Holding Company Act would be a sound solution to the problem of tie-ins involving banks because while the anti-trust laws were generally applicable to banking, "a serious question remains as to the extent to which they can practically eliminate such practices in view of the Justice Department's limited enforcement resources." 1970 U.S. Code Cong. & Admin. News at 5559. This is true, McLaren indicated, because, as distinguished from the requirements normally applied under the Sherman and Clayton Acts, bank tie-ins are "so limited in scope or involve such small amounts . . . as (not) to seem to justify the expensive and time consuming efforts of full scale anti-trust investigation." *Id.* Therefore, Senator Brooke said the committee adopted the anti-tying provisions despite efforts of individuals and interests (presumably as represented by Senators Percy, Goodell, Packwood, and Bennett) to remove the safeguards of the Act against "abusive conduct on the part of banks." *Id.*

Additionally, McLaren had stressed that the anti-tying provisions of the BHCA were not intended to parallel what either the Clayton or Sherman Acts did. *Id.* at 5559. Rather, the BHCA Amendments were intended to "supplement . . . existing remedies against anti-competitive tying arrangements." *Id.* at 5560-5561.[5] Moreover, it would have been seemingly redundant

[5] The views of Assistant Attorney General McLaren should bear significance as to the legislative intent. That is true because "(a)s the number of laws and programs increases, the level of attention that an individual legislator can devote to any one area declines." DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State,* 72 Va.L.Rev. 399, 426 (1986). Accordingly, determining what a statute means has frequently become the province of "specialists." *Id.*

both as a matter of wise policy and as a matter of any perceived need for congressional action in 1970 to conclude that section 1972 did no more with respect to the abuses perceived by Congress as affecting the banking industry than the anti-trust laws already did. As the Seventh Circuit itself has held, irrespective of the anti-tying provisions of the BHCA Amendments, the anti-trust laws are already applicable to banking corporations. See *Weit v. Continental Illinois National Bank and Trust Co.*, 641 F.2d 457 (7th Cir. 1981).

The Seventh Circuit may have questioned the wisdom of the Congress in enacting a statute of the scope and purpose of the anti-tying provisions of the BHCA Amendments of 1970. But, "unless the contrary unmistakably appears," Posner, *The Federal Court: Crisis and Reform* at 288, citing 2 Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law,* 1410-17 (tent. ed. 1958), a court "should assume . . . that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." *Id.* To that end, a court should "study the values and attitudes (of the legislators), as far as they can be known today, of the period when the legislation was enacted." Posner, *supra* at 287. In that respect, a court should be careful not "to ascribe to legislators of the . . . early 1970s the skepticism regarding the size of government and the efficiency of regulation that is widespread today. . . ." *Id.*

The Seventh Circuit's opinion in this case reflects a clear divergence from the plain language of the statute which language is consistent with the purposes of the statute as set forth in the legislative history. It reflects a divergence from the understanding of the statutory language and purpose as expressed by the Fifth Circuit in *Bruce v. First Federal Savings and Loan Assoc. of Conroe, Inc., supra*; the Sixth Circuit in *Costner v. Blount, supra*; and the Eleventh Circuit in *Parsons Steel, Inc. v. First Alabama Bank, supra.* It also appears to reflect what Judge Posner has cautioned against — namely a

skepticism respecting the efficacy of regulation that was not present in the 91st Congress sitting in 1970.

This Court has not had occasion to address itself to the question posed in this case or to any question under the anti-tying provisions of the Bank Holding Company Act Amendments of 1970. See for e.g. *American Federation of Musicians v. Wittstein,* 379 U.S. 171, 175 (1964). Because of what appears to be the divergence from the meaning of the statute as expressed in its language and as confirmed by its legislative history, and because of the direct conflict between the Fifth and the Seventh Circuits, this Court should address itself to the question posed. See *Avco Corp. v. Aero Lodge,* 735, 390 U.S. 557, 559 (1968); *Northeastern National Bank v. United States,* 387 U.S. 213, 217 (1967). Further, the issue posed in this case relates to the means by which an act of Congress regulating banks is intepreted and applied. See for e.g. *United States v. Ruzicka,* 329 U.S. 287 (1946). It is important that the act be uniformly interpreted and applied, particularly in light of its provisions for administrative as well as judicial enforcement. *Id.*

This Court's guidance seems particularly imperative in light of the conflicting lessons that the Seventh Circuit on the one hand and the Fifth, Sixth, and Eleventh on the other are drawing from the legislative history. There is no doubt that the "multiple purposes of statutes make unitary congressional intent difficult to discern." DeLong, *supra,* n.5 at 426, n.78, citing *TVA v. Hill,* 437 U.S. 153, 172-93 (1978). In that respect, "citing legislative history is like 'looking over a crowd and picking out your friends.' " *Id.*, citing Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 Iowa.L.Rev. 195, 214 (1983) (remark attributed to the late Judge Leventhal of the D.C. Circuit). This Court's granting of review would enable the lower courts to forego picking and choosing among snippets in the legislative history which have yielded conflicting results. Those conflicting results have left enforcement of the BHCA wholly dependent upon the section of the country where the parties reside.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted:

JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1596

ROBERT DAVIS, VIRGINIA DAVIS, WILLIAM DAVIS, DYNAMIC GENES, INC., A Deleware corporation, f/k/a BIG D SEED CO., a Deleware corporation, DAVID HYBRID CORN CO., and DAVIS SEED FARMS,
Plaintiffs-Appellants,

v.

FIRST NATIONAL BANK OF WESTVILLE, a national banking association, and FIRST NATIONAL BANK OF DANVILLE, a national banking association,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 86 C 2330—**Harold A. Baker,** *Judge.*

ARGUED NOVEMBER 9, 1988
DECIDED JANUARY 26, 1989

Before BAUER, *Chief Judge,* POSNER, *Circuit Judge,* and WILL, *Senior District Judge.**

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* The Honorable Hubert L. Will, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

BAUER, *Chief Judge.* Plaintiff-appellants Robert, Virginia, and William Davis appeal from the district court's grant of summary judgment to defendant-appellees First National Bank of Westville and First National Bank of Danville on the Davises' claim that the Banks violated an anti-tying provision of the 1970 amendments to the Bank Holding Company Act ("BHCA"). We affirm.

The relevant facts are straightforward. The Davises maintained a relationship with the banks from 1977 until 1985, during which period the Davises borrowed substantial sums of money and, in return, executed a number of notes payable to the banks. In late 1984 or early 1985, the Davises realized that they needed an additional $200,000 to keep their business afloat. The banks would not lend the Davises additional funds, however, unless the Davises agreed to liquidate their business and pay off their existing debts to the banks. On June 28, 1985, the Davises signed a loan agreement with the banks, the twelfth paragraph of which required the Davises to enter into a contract to sell their business by September 1, 1985. When the Davises failed to sell their business by that deadline, the banks insisted that the Davises cease operations and start liquidating. In February, 1986, the Davises sold their business.

The Davises filed this action in December, 1986, charging that paragraph twelve of their June 1985 loan agreement with the banks violated an anti-tying provision of the 1970 amendment to the BHCA, 12 U.S.C. § 1972(1)(c), because it required the Davises to provide the banks with a service not usually related to or provided in connection with a loan—the liquidation of their business. On February 18, 1988, the district court granted the banks' motion for summary judgment on the Davises' tying claim, holding that the requirement in paragraph twelve that the Davises liquidate their business was not an anticompetitive practice, and that the liquidation requirement was a traditional banking practice designed to protect the banks' investment with the Davises.

Adopted in 1970, Chapter 22 of the BHCA, codified at 12 U.S.C. §§ 1971-1978, proscribes certain conditional actions where their effect would be to increase the economic power of banks and to lessen competition. 1970 U.S. Code Cong. & Admin. News, pp. 5519, 5535. It was intended "only to 'prohibit *anticompetitive* practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.' " *McCoy v. Franklin Savings Ass'n,* 636 F.2d 172, 175 (7th Cir. 1980) (quoting Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, pp. 5519, 5535) (emphasis added); *Swerdloff v. Miami National Bank,* 584 F.2d 54, 58 (5th Cir. 1978); *Duryea v. Third Northwestern National Bank,* 606 F.2d 823, 825 (8th Cir. 1979); *Tose v. First Pennsylvania Bank, N.A.,* 648 F.2d 879, 897 (3d Cir. 1981). It "was *not* intended to interfere with the conduct of appropriate traditional banking practices." *McCoy,* 636 F.2d at 175 (emphasis added); *Clark v. United Bank of Denver National Ass'n,* 480 F.2d 235, 238 (10th Cir. 1973); *B.C. Recreational Industries v. The First National Bank of Boston,* 639 F.2d 828, 831 (1st Cir. 1981). Nor was it intended to prohibit attempts by banks to protect their investments. *McCoy,* 636 F.2d at 175; *Tose,* 648 F.2d at 897.

To that end, the BHCA's anti-tying provision, 12 U.S.C. § 1972, states

> "(1) A bank shall not in any manner extend credit . . . on the condition or requirement—
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
> >
> > (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

Thus, to achieve its purpose of checking the economic power of banks, section 1972 proscribes tying (subsection (1)(A) and (B)), reciprocity (subsection (1)(C) and (D)), and exclusive dealing (subsection (1)(E)) arrangements that traditionally have been targets of the antitrust laws because of their potentially anticompetitive effects. *Bruce v. First Federal Savings and Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988). A tie-in is "an arrangement by one party to sell one product (the 'tying product'), but only on the condition that the buyer also purchase a different . . . product (the 'tied product'), or at least agree that he will not purchase that product from another supplier." *Northern Pacific Railroad v. United States*, 356 U.S. 1, 5-6 (1958). A tie-in lessens competition when it enables an economically powerful seller of the tying product to coerce customers of that product into buying an additional product they do not want or would rather buy elsewhere. A reciprocity arrangement can take more than one form. It may be the harmless practice of buying from and selling to one's customers, or it may be coercive. An economically powerful bank, for ex-

ample, may agree to loan money to a pen manufacturer only if the manufacturer agrees to sell pens to the bank and its affiliates at a discount. The antitrust laws are concerned with tie-ins and reciprocity agreements when they enable a party with sufficient power in one market to avoid the standard market criteria of price, quality, and service in another market and thereby lessen competition.

The purpose and effect of section 1972, then, "is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements." *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, 245 (11th Cir. 1982); *see also Exchange National Bank of Chicago v. Daniels,* 768 F.2d 140, 143 (7th Cirl. 1985) (noting that section 1972 is meant to preserve competition among rival businesses and that it is the banking equivalent of section 3 of the Clayton Act, 15 U.S.C. § 14). For section 1972 renders tying arrangements involving a bank unlawful

> without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of [section 1972] are applicable regardless of the amount of commerce involved.

Senate Report No. 91-1084, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News 5519, 5558 (supplementary views of Senator Brooke).

Nevertheless, even under this "relaxed" *per se* approach to banking tie-ins, a plaintiff seeking relief under section 1972 must still complain of a practice that is anticompetitive. *Parsons,* 679 F.2d at 245 ("Unless the 'unusual' banking practice is

shown to be an anticompetitive tying arrangement which benefits the bank, it does not fall within the scope of the Act's prohibitions."); *see also B.C. Recreational Industries,* 639 F.2d at 832; *Clark,* 480 F.2d at 238; *Duryea,* 606 F.2d at 825; *Tose,* 648 F.2d at 897; *but see Bruce,* 837 F.2d at 718. If not, as the Eleventh Circuit has noted, section 1982 would prohibit banks "from devising particular methods for protecting themselves against default" and could, in various situations, "have the undesirable effect of discouraging banks from granting extensions of credit, and thus precipitate foreclosure or bankruptcy." *Parsons,* 679 at 245. Any such condemnation of banking practices that have no anticompetitive effect but are aimed at protecting the bank's investment would run directly contrary to section 1972's legislative purpose and would render coincidental the statute's concern with arrangements traditionally targeted by the antitrust laws.

The Davises, unfortunately, do not complain of an anticompetitive reciprocity arrangement. They allege that the banks violated section 1972(1)(c)—the provision dealing with reciprocity arrangements—by granting their request for credit only on the condition that the Davises provide a business liquidation "service" to the banks. The Davises do not allege that the defendant banks attempted to prevent the Davises from dealing with other banks. Nor can they possibly claim that the defendant banks were attempting to use their market power over credit to secure business liquidation services at better-than-market terms. Indeed, we find it difficult to characterize the banks' requirement that the Davises liquidate their business in order to obtain the credit they sought as an "additional service" under section 1972(1)(c). The Davises seem to want to avoid calling a credit term a credit term; if so, they are not really alleging a reciprocity arrangment. Even if they are alleging such an arrangement, it is not anticompetitive and therefore not the concern of section 1972, which was enacted to prevent banks from using their economic power to *lessen competition.*

The former Fifth Circuit's decision in *Swerdloff* does not convince us otherwise.

> In *Swerdloff* the bank allegedly required the owners of an indebted corporation to sell 51% of the company stock to a competitor, also a customer of the bank. The issue there was whether the fact that a bank required the sale of a business to a third party where no benefit to the bank was alleged, constituted a 'tying arrangement' under [the BHCA]. The court held that where a bank is alleged to have imposed a requirement that the business be sold as a condition for granting further credit, benefit to the bank may be assumed *for purposes of a motion on the pleadings.*

Parsons, 679 F.2d at 242 (emphasis added). In *Parsons,* then, the Eleventh Circuit, one of the successor courts to the Fifth Circuit, limited the holding of *Swerdloff* to motions to dismiss and made clear that, to establish a section 1972 violation, even an unusual banking practice must be shown to be an anticompetitive tying arrangement. *Id.* at 245-46. The Davises, of course, did not lose in the district court on a motion to dismiss but on a motion for summary judgment, and they have made clear in their arguments to this court that they do not claim that the banks used their economic power over credit to lessen competition. *Swerdloff,* therefore, cannot help the Davises.

Nor can another case upon which the Davises rely, *Costner v. Blount National Bank of Maryville Tennessee,* 578 F.2d 1192 (6th Cir. 1978). In *Costner,* a fifty-percent owner of an automobile dealership obtained a personal loan from the defendant bank to purchase the remainder of the dealership's outstanding stock. The bank imposed several credit conditions in the parties' loan agreement, including requirements that the dealership sell a substantial share of its retail commercial paper to the bank and that the dealership employ a person designated by the bank to ensure compliance with the arrangement. The

agreement so clearly violated section 1972's anti-tying provisions that the bank on appeal conceded such a violation and contended only that its illegal tying arrangement did not damage the plaintiff and that it did not sufficiently affect interstate commerce to constitute a violation of the *Sherman Act*.

In short, we conclude that the district court did not err in granting summary judgment to the banks on the Davises' section 1972 tying claim. Since the practice of which the Davises complain is in no way anticompetitive, it is outside the scope of the 1970 amendments to the BHCA.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 86-2330

ROBERT DAVIS, et al.,
Plaintiffs,

vs.

THE FIRST NATIONAL BANK OF WESTVILLE, et al.,
Defendants.

ORDER

(Filed: February 18, 1988)

On December 22, 1986, the plaintiffs filed a complaint alleging a violation of 12 U.S.C. 1972 (1980). The complaint also contains a pendent state law claim. The matter is presently before the court on the defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56.

The following facts are undisputed. The plaintiffs and the defendants had a banking relationship dating back to 1977 and continuing through 1985. During that period of time, the plaintiffs borrowed substantial amounts of money from the defendants and in return executed notes payable to the defendants. Sometime in late 1984 or early 1985, it became apparent that the plaintiffs were going to need an additional $200,000 in order to stay in business. The defendants would not agree to lend the plaintiffs the additional $200,000 unless the plaintiffs agreed to liquidate their business and pay their indebtedness to the defendants. On June 28, 1985, the plaintiffs signed a loan agreement with the defendants. Paragraph 12 of that agreement states that the plaintiffs are required to enter into a contract to sell their business by September 1, 1985.

The complaint alleges that Paragraph 12 of the loan agreement violates 12 U.S.C. 1972(1)(c). Section 1972(1)(c) provides that:

> (1) a bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—
>
> (c) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service; . . . ."

The plaintiffs contend that the defendants violated 1972(1)(c) by including Paragraph 12 in the loan agreement, because Paragraph 12 requires the plaintiffs to provide the bank with a "service" other than what is usually related to or provided in connection with a loan. The plaintiffs contend that the "service" is the requirement that they sell their business by September 1, 1985. The defendants, on the other hand, contend that this provision was inserted merely to protect their investment and collect the debt from the plaintiffs.

Section 1972(1)(c) is intended to prohibit anticompetitive banking practices, practices that attempt to prevent customers from dealing with other banks. *Exchange Nat. Bank of Chicago v. Daniels,* 768 F.2d 140, 143 (1985); *McCoy v. Franklin Savings Association,* 636 F.2d 172, 175 (7th Cir. 1980). Section 1972(1)(c) was not intended to interfere with traditional banking practices or to prohibit attempts by banks to protect their investments. *McCoy,* 636 F.2d at 175.

The plaintiffs had been borrowing from the defendants for a long time. When the plaintiffs went to the defendants and asked for a further loan, the defendants wanted to make sure the plaintiffs paid back the new loan as well as the previous loans. The defendants did not receive anything from the plantiffs ex-

cept the repayment of the loans. Paragraph 12 of the loan agreement merely protected the defendants' investment. Furthermore, the defendants' actions were in no way "anticompetitive." The plaintiffs could have gone to any other bank at any time and gotten the money to pay off the defendants and not have had to sell their business. Therefore, the defendants did not violate 12 U.S.C. 1972(1)(c) by including Paragraph 12 in the June 28, 1985, loan agreement, and the defendants' motion for summary judgment is allowed.

The court must also dismiss the plaintiffs' pendent state law claims because the court no longer has jurisdiction over such claims. *Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment is allowed.

ENTER this 18th day of February, 1988.

/s/ HAROLD A. BAKER
Chief U.S. District Judge

APPENDIX C

JUNE 28, 1985 FINANCE AGREEMENT

DATED: June 28, 1985

FINANCE AGREEMENT

WHEREAS, THE FIRST NATIONAL BANK OF WESTVILLE, Westville, Illinois, a National Banking Association, (hereinafter referred to as "Bank" or "Lender"), has had a continuing financial relationship with Robert S. Davis, Virginia M. Davis, and William R. Davis, individually and as owners and operators of BIG D SEED COMPANY, DAVIS HYBRID CORN COMPANY, a proprietorship, and DAVIS SEED FARMS, a partnership, (hereinafter referred to as "Davis" or "Borrower" as the context may require, dating from 1979, and

WHEREAS, BIG D SEED COMPANY is a corporation and DAVIS SEED FARMS is a partnership in which Robert S. Davis and William R. Davis are the partners, and Robert S. Davis is a sole proprietor doing business as DAVIS HYBRID CORN COMPANY and all of said business organizations and operations are intertwined with common ownership and due a substantial amount of business with each other so that the financial operations of one business entity is dependent upon the financial operations of the other business entity in such a manner that an extension of credit to one business entity aids and assists directly and indirectly, the financial operations of all of said business entities referred to above, and

WHEREAS, all of the shareholders of BIG D SEED COMPANY are Robert S. Davis, Virginia M. Davis, Georgianna J. Giese, Nancy J. Prange and William R. Davis, and all of said shareholders are all of the directors of BIG D SEED COMPANY and all of said shareholders and directors and William R. Davis and Robert S. Davis as partners, and Robert S. Davis as an individual proprietor, and Virginia M. Davis individually believe that an agreement is necessary for the extension of addi-

tional financing to BIG D SEED COMPANY in accordance with the terms and conditions of this financing agreement and they wish to join together in consenting to all of the terms and conditions herein set forth, and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 24296 in the principal amount of $414,286.00, dated August 24, 1984, with interest thereon at the rate of The First National Bank of Danville's base lending rate floating policy, with interest payable at maturity, with a maturity date of February 20, 1985, (a copy of said note is attacted hereto as Exhibit "A" and is incorporated herein by reference thereto,) said note being secured by two security agreements dated March 2, 1979, and April 25, 1983, (a copy of said security agreements are attached hereto as Exhibit "B" and are incorporated herein by reference thereto), assignment of beneficial interest in Land Trust No. 5151 dated April 4, 1983, at The First National Bank of Danville, Danville, Illinois, (a copy of said assignment is attached hereto as Exhibit "C" and is incorporated herein by reference thereto), and a security agreement with assignment of contract rights as collateral to secure indebtedness dated April 4, 1983, (a copy of said agreement is attached hereto as Exhibit "D" and is incorporated herein by reference thereto), and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 24394 in the principal amount of $150,000.00 dated October 22, 1984, with interest thereon at the rate of The First National Bank of Danville's base lending rate floating policy, with interest payable at maturity, with a maturity date of April 22, 1985, (a copy of said note is attached hereto as Exhibit "E" and is incorporated herein by reference thereto,) said note being secured by a security agreement dated March 9, 1984, (a copy of said security agreement is attached hereto as Exhibit "F" and is incorporated herein by reference thereto), assignment of beneficial interest in Land Trust No. 5151 dated April 4, 1983,

at The First National Bank of Danville, Danville, Illinois, (a copy of said assignment is attached hereto as Exhibit "C" and is incorporated herein by reference thereto), and a security agreement with assignment of contract rights as collateral to secure indebtedness dated April 4, 1983, (a copy of said agreement is attached hereto as Exhibit "D" and is incorporated herein by reference thereto), and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 24410 in the principal amount of $50,000.00, dated November 1, 1984, with interest thereon at the rate of The First National Bank of Danville's base lending rate floating policy, with interest payable at maturity, with a maturity date of April 30, 1985, (a copy of said note is attached hereto as Exhibit "G" and is incorporated herein by reference thereto,) said note being secured by a security agreement dated March 9, 1984, (a copy of said security agreement is attached hereto as Exhibit "F" and is incorporated herein by reference thereto), assignment of beneficial interest in Land Trust No. 5151 dated April 4, 1983, at The First National Bank of Danville, Danville, Illinois, (a copy of said assignment is attached hereto as Exhibit "C" and is incorporated herein by reference thereto), and a security agreement with assignment of contract rights as collateral to secure indebtedness dated April 4, 1983, (a copy of said agreement is attached hereto as Exhibit "D" and is incorporated herein by reference thereto), and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 24505 in the principal amount of $150,000.00, dated January 3, 1985, with interest thereon at the rate of The First National Bank of Danville's base lending rate floating policy, with interest payable at maturity, with a maturity date of April 3, 1985, (a copy of said note is attached hereto as Exhibit "H" and is incorporated herein by reference thereto,) said note being secured by a security agreement dated March 9, 1984, (a copy of said

security agreement is attached hereto as Exhibit "F" and is incorporated herein by reference thereto), assignment of beneficial interest in Land Trust No. 5151 dated April 4, 1983, at The First National Bank of Danville, Danville, Illinois, (a copy of said assignment is attached hereto as Exhibit "C" and is incorporated herein by reference thereto), and a security agreement with assignment of contract rights as collateral to secure indebtedness dated April 4, 1983, (a copy of said agreement is attached hereto as Exhibit "D" and is incorporated herein by reference thereto), and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 20675 in the principal amount of $400,000.00, dated February 13, 1979, with interest thereon at the Prime Rate as posted at Continental Illinois National Bank and Trust Company, Chicago, Illinois, with interest payable quarterly, with a maturity date of February 13, 1985, (a copy of said note is attached hereto as Exhibit "I" and is incorporated herein by reference thereto,) said note being secured by a real estate mortgage dated February 13, 1979, (a copy of said mortgage is attached hereto as Exhibit "J" and is incorporated herein by reference thereto) and a security agreement dated February 13, 1979, (a copy of said security agreement is attached hereto as Exhibit "K" and is incorporated herein by reference thereto), and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 20674 in the principal amount of $400,000.00, dated February 13, 1979, with interest thereon at the Prime Rate as posted at Continental Illinois National Bank and Trust Company, Chicago, Illinois, with interest payable quarterly, with a maturity date of October 1, 1990, (a copy of said note is attached hereto as Exhibit "L" and is incorporated herein by reference thereto,) said note being secured by a real estate mortgage dated February 13, 1979, (a copy of said mortgage is attached hereto as Exhibit "K" and is incorporated herein by reference thereto), and

WHEREAS, Davis has executed and delivered to the Bank for due consideration a certain promissory note, being Note No. 24491 in the principal amount of $140,000.00, dated December 26, 1984, with interest thereon at the rate of The First National Bank of Danville's base lending rate floating policy, with interest payable at maturity, with a maturity date of August 30, 1985, (a copy of said note is attached hereto as Exhibit "M" and is incorporated herein by reference thereto), said note being secured by a security agreement dated March 9, 1984, (a copy of said security agreement is attached hereto as Exhibit "F" and is incorporated herein by reference thereto), assignment of beneficial interest in Land Trust No. 5151 dated April 4, 1983, at The First National Bank of Danville, Danville, Illinois, (a copy of said assignment is attached hereto as Exhibit "C" and is incorporated herein by reference thereto), and a security agreement with assignment of contract rights as collateral to secure indebtedness dated April 4, 1983, (a copy of said agreement is attached hereto as Exhibit "D" and is incorporated herein by reference thereto), and

WHEREAS, Robert S. Davis, individually, and Virginia M. Davis, individually, executed and delivered to The First National Bank of Westville on or about January 31, 1985, a Loan Guaranty Agreement to guarantee the loans of Big D Seed Company, (a copy of said guaranty is attached hereto as Exhibit "N" and is incorporated herein by reference thereto), and

WHEREAS, Davis and all persons claiming an ownership interest in Big D Seed Company, Davis Seed Farm, a partnership, and Robert S. Davis, doing business as Davis Hybrid Corn Company, wish and desire to concur with and agree to the terms of the loan agreement herein set forth.

NOW, THEREFORE, in consideration of the foregoing and in consideration of the mutual covenants of the parties hereto, hereinafter set forth, and for other good and valuable consideration, the receipt of which are jointly and severally

acknowledged, it is hereby covenanted and agreed by and between the parties hereto as follows:

1. The foregoing recitals are incorporated in this agreement and made a part hereof.

2. *DEFINITIONS.*

2.1. "*Accounts*" shall mean all present and future rights (including, without limitations, rights under any futures contracts, forward sale contracts or other contracts) of Borrower for payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

2.2. "*Account Debtor*" shall mean the party who is obligated on or under an Account.

2.3. "*Collateral*" shall mean any and all assets in which Lender may now or hereafter have a lien or security interest to secure the "Liabilities" (as hereinafter defined).

2.4. "*Default*" shall mean the occurrence or existence of any one or more of the following events: (a) the Borrower fails to pay any principal or interest due under this Agreement, or any of the other Financing Agreements at the time such principal or interest becomes due or is declared due; (b) the Borrower fails to pay any of the Liabilities other than principal and interest, on or before 3 days after such Liabilities become due or are declared due; (c) the Borrower fails or neglects to perform, keep or observe any of the covenants, conditions, promises, or agreements contained in Section 8 of this agreement; (d) the Borrower fails or neglects to perform, keep or observe any of the covenants, conditions, promises or agreements contained in this Agreement (other than those referred to or covered in (a), (b), or (c) above, or in any of the other Financing Agreements, and such failure continues for more than ten (10) days after such failure or neglect first occurs, provided that such grace period

shall not apply, and the Borrower shall be in Default promptly upon its failure or neglect, if such Default may not, in the Lender's sole determination, be cured by the Borrower during such ten (10) day grace period; (e) any warranty or representation now or hereafter made by or on behalf of the Borrower in connection with this Agreement, or any of the other Financing Agreements is untrue or incorrect in any respect, or any schedule, certificate, statement, report, financial data, notice, or writing furnished at any time by or on behalf of the Borrower to the Lender is untrue or incorrect in any respect, on the date as of which the facts set forth therein are stated or certified; (f) a judgment or other claim in excess of $5,000.00 shall be rendered against the Borrower and such judgment shall remain unsatisfied or undischarged and in effect for thirty (30) consecutive days without a stay of enforcement or execution; (g) a notice of lien, levy, or assessment is filed or recorded with respect to any of the assets of the Borrower by the United States, or by any department, agency or instrumentality thereof, or by any other national, state, county, municipality or other governmental agency or any taxes or debts owing at any time or times hereafter to any one or more of them become a lien upon any of the Collateral; (h) all or any part of the Collateral is attached, seized, subjected to a writ or distress warrant, or is levied upon, or comes within the possession of any receiver, trustee, custodian or assignee for the benefit of creditors; or any of the Borrower's other assets are attached, seized, subjected to a writ of distress warrant, or are levied upon, or come within the possession of any receiver, custodian, or assignee for the benefit of creditors; (i) a proceeding under bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt or receivership law or statute is filed against the Borrower and such proceeding is not dismissed within thirty (30) days of the date of its filing; or a proceeding under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt or receivership law or statute is filed by the Borrower; or the Borrower makes as assignment for the benefit of creditors; (j) the

Borrower is enjoined, restrained, or in any way prevented by the order of any court or any administrative or regulatory agency from conducting any of its business affairs; (k) the Borrower shall fail to make any payment due on any other obligation for borrowed money and the effect of such failure shall be to cause or permit the holder of such obligation or a trustee to cause such obligation to become due prior to its date of maturity; (l) the Lender shall, at any time or times hereafter, determine that it is insecure with respect to the prompt payment of any of the Liabilities or that such change has occurred in the condition or affairs (financial or otherwise) of the Borrower as, in the sole opinion of Lender, impairs or is likely to impair the value of the Collateral, or (m) Borrower fails to enter into a contract or contracts by executing and delivering to and receiving an executed contract or contracts from a good faith buyer or buyers on or prior to September 1, 1985, with a closing date of not later than July 31, 1986, of a sufficient number of the assets of BIG D SEED COMPANY, DAVIS HYBRID CORN COMPANY and DAVIS SEED FARMS in which the Bank holds a security interest which sale shall at a minimum generate all funds necessary on the date of closing to pay to the Bank all accrued interest and principal on all notes which Borrower owes to the Bank, but that said contract or contracts shall be on such terms and conditions as are acceptable to the Borrower subject to the generation of funds necessary to pay off the Bank in full of all balances due and owing on all of the liabilities of Borrower to Bank.

2.5. "*Equipment*" shall mean any and all goods, other than Farm Products and Inventory, which are now or hereafter owned or acquired by Borrower, together with any and all accessions, parts and appurtenances thereto.

2.6. "*Event of Default*" shall mean an event which through the passage of time or the service of notice or both would (assuming no action is taken by the Borrower or any other Person to cure the same) mature into a Default.

2.7. "*Documents*" shall mean any and all warehouse receipts, bills of lading or similar documents of title relating to goods in which the Borrower at any time has an interest, whether now or at any time or times hereafter issued to the Borrower or the Lender by any Person, and whether covering the Borrower's Inventory, Farm Products or otherwise.

2.8. "*Farm Products*" shall mean all of Borrowers crops or seed now or hereafter growing or grown and all other personal property of Borrower used or for use in farming operations including, without limitation, native grass, grain, fertilizer, hay, silage, livestock (including without limitation, offspring), and supplies now or hereafter owned by Borrower or now or hereafter purchased by or for the benefit of Borrower. Farm Products shall also include, but shall not be limited to, feed supplements, seed inventory, processed or in process, veterinary supplies, and related products whether purchased by or for the benefit of Borrower, and any other farm products, (as that term is used and defined in the Uniform Commercial Code of Illinois.)

2.9. "*Financing Agreements*" shall mean all agreements, instruments and documents, including without limitation, Drafts, this Agreement and all security agreements, loan agreements, notes, guarantees, mortgages, deeds of trust, subordination agreements, pledges, powers of attorney, consents, assignments, contracts, notices, leases, financing statements, and all other written matter whether heretofore, now, or hereafter executed by or on behalf of Borrower and delivered to Lender, together with all amendments thereof and all agreements and documents referred to therein or contemplated thereby.

2.10. "*General Intangibles*" shall mean all of the Borrower's right, title and interest in any negotiable or non-negotiable instruments or securities, choses in action, causes of action and all other intangible personal property of the Borrower of every kind and nature (other than Accounts), whether presently owned or hereafter acquired or arising, including, without

limitation, business records, inventions, designs, patents in bred lines, patent applications, trademarks, trade names, trade secrets, goodwill, registrations, copyrights, licenses, and rights to payment and royalties thereunder, franchises, customer lists, tax refund claims and any guarantee claims, security interests or other security held by or granted to the Borrower to secure payment by an Account Debtor of any of the Accounts.

2.11. "*Inventory*" shall mean any and all goods other than Farm Products, including, without limitation, goods in transit, wheresoever located, whether now owned or hereafter acquired by Borrower, which from time to time are held for sale or lease, furnished under any contract of service or held as raw materials, work in process or supplies, and all materials used or consumed in Borrower's business, seed inventories, processed or in process, and shall include all Borrower's now owned or hereafter acquired grain or grain-related products.

2.12. "*Liabilities*" shall mean any and all liabilities, obligations, and indebtedness of Borrower to Lender of any and every kind and nature, whether heretofore, now or hereafter, owing, arising, due or payable and howsoever evidenced, created, incurred, acquired, or owing, whether primary, secondary, direct, contingent, fixed or otherwise (including obligations of performance), and whether arising or existing under this Agreement, or any of the other Financing Agreements, or by oral agreement, operation of law or otherwise.

2.13. "*Margin Accounts*" shall mean all existing and/or hereafter acquired or accumulated futures contracts or funds and other property related to such futures contracts, which Borrower or its authorized attorney-in-fact may acquire, accumulate, withdraw or pay out, and held with any broker, including any balance credited to any Margin Account upon its closing.

2.14. "*Person*" shall mean any individual, sole proprietorship, partnership, joint venture, trust, unincorporated

organization, association, corporation, institution, entity, party, or government (whether national, federal, state, provincial, county, city, municipal, or otherwise, including, without limitation, any instrumentality, division, agency, body, or department thereof.

2.15. "*Position Report*" shall mean a report, in form and detail acceptable to Lender, listing (a) the type and amount of all grain inventories, plus processed or in process seed inventories, owned and on hand, stored for third parties and purchased but not yet on hand, (b) the number, type, age and weight of all livestock owned and on hand, (c) all forward sale contracts and all futures contracts by type, amount and price, and (d) a report on the development of inbred lines under research and development by Borrower.

2.16. "*Term Note*" shall mean the promissory note in the original principal amount of $200,000.00 from Borrower to Lender of even date herewith and which is delivered by Borrower in accordance with the terms of this agreement.

2.17. *Accounting Terms.* Any accounting terms used in this Agreement which are not specifically defined herein shall have the meanings customarily given them in accordance with generally accepted accounting principles, as consistently applied as of the date of this Agreement.

2.18. *Others Defined in Illinois Uniform Commercial Code.* All other terms contained in this Agreement (and which are not otherwise specifically defined herein) shall have the meanings provided by the Uniform Commercial Code of Illinois (the "Code") to the extent the same are used or defined therein.

3. *CREDIT*

3.1. Credit for new loans. (Term Note) Provided that all persons claiming an ownership interest in Big D Seed Company, a corporation, Davis Seed Farms, a partnership, and Robert S. Davis, doing business as Davis Hybrid Corn Company, a pro-

prietorship, acknowledge by a separate document that they understand fully and completely the terms and conditions of the Finance Agreement and that the Borrower hereto shall execute and deliver to the Bank this Finance Agreement and all other documents necessary to effectuate the renewal loans referred to herein, the Bank shall provide renewal financing to Big D Seed Company, a corporation, Davis Seed Farms, by Robert S. Davis and William R. Davis, partners, Robert S. Davis, doing business as Davis Hybrid Corn Company, a proprietorship, and Robert S. Davis and Virginia M. Davis, individually, by renewing the following notes identified by No. 24296, No. 24394, No. 24410, and No. 24505, by executing and delivering the promissory notes, copies of which are attached hereto. This agreement shall act as an additional security agreement for such financing and refinancing and the terms and conditions of said promissory notes are incorporated herein by this reference thereto as if fully set forth herein. Any conflict between the form of said promissory notes and this Finance Agreement shall be governed by the terms of this Finance Agreement.

3.2. *Statements.* All advances to the Borrower, and all other debits and credits provided in this Agreement, shall be evidenced by entries made by the Lender in its internal data control systems showing the date, amount and reason for each such debit or credit. The balance due the Lender, as set forth on the Lender's most recent printout, shall be conclusive evidence of the amount due and owing the Lender by the Borrower. Any statement of account delivered by the Lender to the Borrower shall constitute an account stated unless, within thirty (30) days after receipt of any statement from Lender, the Borrower shall deliver to the Lender written objection thereto specifying the error or errors, if any, contained in such statement.

4. *Safekeeping of Collateral.* Lender shall not be responsible for: (i) the safekeeping of the Collateral; (ii) any loss or damage to the Collateral; (iii) any diminution in the value of the Collateral; or (iv) any act or default of any carrier, warehouseman,

bailee, forwarding agency or any other Person. All risk of loss, damage, destruction or diminution in value of the Collateral shall be borne by Borrower.

5. *CONDITIONS OF FINANCING.*

Notwithstanding any other provision contained in this Agreement, the making of any advance provided for herein shall be conditioned upon the following:

5.1. *Other Requirements.* Lender shall have received, in form and substance satisfactory to Lender, all warehouse receipts, bills of lading, drafts, certificates, orders, authorities, consents, affidavits, schedules, instruments, security agreements, and other documents which are provided for hereunder, or which Lender may at any time reasonably request.

6. *COLLATERAL.*

6.1. *Security Interests and Liens.* To secure payment and performance of the Liabilities, the Borrower hereby grants to the Lender a continuing security interest in and to the following property and interests in property, whether now owned or existing or hereafter acquired or arising and wheresoever located: all crops (whether growing or harvested), for calendar year 1985 grown and produced on the real estate described in Schedule 2 attached hereto and incorporated herein by reference thereto, Farm Products, Accounts, Inventory, machinery, Equipment, furniture goods, fixtures, General Intangibles (including, without limitation, inventions, designs, patents, patent applications, trademarks, trademark applications, trade names, licenses and rights to payments and royalties thereunder, leasehold interests in real and personal property, rights under any futures contracts or in any hedging or margin accounts, franchises, co-op memberships, tax refund claims, and guaranteed claims, security interests or other security held by or granted to Borrower to secure payment of Borrower's Accounts), tax refunds, chattel paper, contract rights, instruments,

Documents, notes, returned and repossessed goods and all deposit accounts (special or general) with any banking or savings institution and all other personal property or interests in personal property, together with all accessions to, substitutions for, and all replacements, products and proceeds of the foregoing (including, without limitation, proceeds of insurance policies insuring any of the foregoing), all books and records (including, without limitation, customer lists, credit files, computer programs, printers and other computer materials and records), pertaining to any of the foregoing and all other property referred to in the security agreements referred to in the recitals of this agreement which property descriptions are incorporated herein by references thereto as if fully set forth herein.

6.2. *Endorsement by the Lender.* The Borrower hereby authorizes the Lender to endorse, in its name, any item, however received by Lender, representing payment on or other proceeds of any of the Collateral.

6.3. *Preservation of Collateral and Perfection of Security Interests Therein.* The Borrower shall also execute and deliver to the Lender, concurrently with the execution of this Agreement, and at any time or times hereafter at the request of the Lender, all financing statements or other documents (and pay the cost of filing or recording the same in all public offices deemed necessary by the Lender), as the Lender may request, in a form satisfactory to the Lender, to perfect and keep perfected the security interest in the Collateral granted by the Borrower to the Lender or to otherwise protect and preserve the Collateral and Lender's security interest therein. Should the Borrower fail to do so, Lender is authorized to sign any such financing statements as to the Borrower's agent. The Borrower further agrees that a certain photographic, photostatic or other reproduction of this Agreement or of a financing statement is sufficient as a financing statement. To perfect the Lender's security interest in any Equipment covered by certificates of titles, the Borrower shall insure that all such certificates of title are prop-

erly noted or endorsed by the appropriate state officials wherever such notation or endorsement is, in the Lender's sole determination, either permitted or required as a condition of perfection.

6.4. *Loss of Value of Collateral.* The Borrower shall immediately notify the Lender of any material loss or depreciation in the value of the Collateral.

6.5. *Collection of Account.* Until such privilege is revoked by Lender, Borrower may, in the ordinary course of its business, adjust, settle and collect all Accounts. Upon an event of default, Lender may revoke such privilege by giving Borrower prior written notice of the same. Borrower does hereby irrevocably designate, make, constitute and appoint Lender, when Lender has revoked the privilege of Borrower referred to above, (and all Persons designated by Lender) as Borrower's true and lawful attorney-in-fact, and in Borrower's or Lender's name, to: (i) demand payment of Account; (ii) enforce payment of Accounts by legal proceedings or otherwise; (iii) exercise all of Borrower's rights and remedies with respect to proceedings brought to collect an Account; (iv) sell or assign any Account upon such terms, for such amount and at such time or times as Lender deems advisable; (v) settle, adjust, compromise, extend or renew an Account; (vi) discharge and release any Account; (vii) take control in any manner of any item of payment or proceeds thereof; (viii) prepare, file and sign Borrower's name upon any items of payment or proceeds thereof and to deposit the same to Lender's account on account of Borrower's Liabilities; (ix) endorse Borrower's name upon any chattel paper, document, instrument, invoice, warehouse receipt, bill of lading, or similar document or agreement relating to any Account or any goods pertaining thereto; (x) sign Borrower's name on any verification of Accounts and notices thereof to Account Debtors; and (xi) do all acts and things which are necessary, in Lender's sole discretion, to fulfill Borrower's obligations under this Agreement.

6.6. *Special Collateral.* Immediately upon Borrower's receipt thereof, Borrower shall deliver or cause to be delivered to Lender, with appropriate endorsement and assignment to vest title and possession in Lender, all chattel paper, instruments, and Documents which Borrower now owns or which it may at any time hereafter acquire. Borrower shall promptly mark all such chattel paper, instruments and Documents to show that the same are subject to Lender's security interest.

6.7. *Remittance of Checks to Lender.* Borrower shall receive, as the sole and exclusive property of Lender, and as trustee for Lender, all monies, checks, notes, drafts and all other payments for and/or proceeds of Collateral which come into the possession or under the control of Borrower (or any of its shareholders, directors, officers, employees, agents or those Persons acting for or in concert with Borrower) and no later than the first business day following receipt thereof, when requested by Lender upon an event of default, Borrower shall remit the same (or cause the same to be remitted), in kind, to Lender or to any agent or agents (at its or their designated address or addresses) appointed by Lender for that purpose.

6.8. *Margin Accounts.* Borrower affirmatively agrees that he will enter into no delay price contracts or futures trading regarding grain, inventory, crops or farm products grown by him or on his behalf during the term of this Agreement, nor shall Borrower participate in any hedging accounts regarding any Collateral securing this Agreement without first getting the written of Lender, which consent shall not be unreasonably withheld.

7. *WARRANTIES.*

As to the corporate Borrower hereunder, the Borrower represents and warrants that as of the date of the execution of this Agreement:

7.1. *Corporate Existence.* The Borrower is a corporation duly organized and in good standing under the laws of the State of

Delaware and is duly qualified as a foreign corporation and in good standing in all states where the nature and extent of the business transacted by it or the ownership of its assets makes such qualification necessary, except for those jurisdictions in which the failure so to qualify would not, in the aggregate, have a material adverse effect on the Borrower's financial condition, results of operations or business.

7.2. *Corporate Authority.* The execution and delivery by the Borrower of this Agreement and all of the other Financing Agreements and the performance of the Borrower's obligations hereunder and thereunder: (i) are within the Borrower's corporate powers; (ii) are duly authorized by the Borrower's Board of Directors and, if necessary, the Borrower's stockholders; (iii) are not in contravention of any law or laws, or the terms of the Borrower's Articles of Incorporation, or By-Laws, or of any indenture, agreement or undertaking to which the Borrower is a party or by which the Borrower or any of its property is bound; (iv) do not require any governmental consent, registration or approval; (v) do not contravene any contractual or governmental restrictions binding upon the Borrower; and (vi) will not, except as contemplated herein, result in the imposition of any lien, charge, security interest or encumbrance upon any property of the Borrower under any existing indenture, mortgage, deed of trust, loan or credit agreement or other agreement or instrument to which the Borrower is a party or by which it or any of its property may be bound or affected.

7.3. *Binding Effect.* This Agreement and all of the other Financing Agreements are the legal, valid and binding obligations of the Borrower executed and delivered by Borrower to Lender and are enforceable against the Borrower in accordance with their terms.

7.4. *Litigation and Proceedings.* Except as set forth on Schedule 2 attached hereto, no judgments are outstanding against the Borrower nor is there now pending or threatened

any litigation, contested claim, or governmental proceeding by or against the Borrower.

7.5. *Other Agreements.* Except as set forth on Schedule 3 attached hereto, the Borrower is not in default under any contract, lease or commitment to which it is a party or by which it is bound. The Borrower knows of no dispute, except as set forth on Schedule 2 or as previously disclosed to the Lender in writing, regarding any contract, lease, or commitment which is material to the continued financial success and well-being of the Borrower.

7.6. *Employee Controversies.* Except as set forth on Schedule 4 attached hereto, there are no controversies pending or threatened between the Borrower and any of its employees, other than employee grievances arising in the ordinary course of business which are not, in the aggregate, material to the continued financial success and well-being of the Borrower.

7.7. *Compliance with Laws and Regulations.* Except as set forth on Schedule 5 attached hereto, the Borrower is in compliance with all laws, orders, regulations, and ordinances or all federal, foreign, state and local governmental authorities relating to the business operations and the assets of the Borrower, except for laws, orders, regulations and ordinances, the violation of which would not have an adverse effect on the value of or Lender's interest in any of the Collateral or, in the aggregate, would not have a material adverse effect on the Borrower's financial condition, results of operations or business.

7.8. *Licenses and Illinois Commercial Code Permits.* There is no action, proceeding, claim or complaint pending or threatened to be brought against the Borrower by the United States Department of Agriculture or the Illinois Department of Agriculture or by any similar state or other governmental authority which might jeopardize any of Borrower's bonds, licenses or permits or the renewals thereof.

7.9. *Tax Liabilities.* The Borrower has filed all federal, state and local tax reports and returns required by any law or regulation to be filed by it, and has either duly paid all taxes, duties and charges indicated due on the basis of such returns and reports, or made adequate provision for the payment thereof, and the assessment of any material amount of additional taxes in excess of those paid and reported is not reasonably expected.

7.10. *Survival of Warranties.* All representations and warranties contained in this Agreement or any of the other Financing Agreements shall survive the execution and delivery of this Agreement.

8. *AFFIRMATIVE COVENANTS.*

The Borrower covenants and agrees that, so long as any Liabilities remain outstanding, and (even if there shall be no Liabilities outstanding) so long as the Lender remains committed hereunder:

8.1. *Financial Statements.* Except as otherwise provided for herein, Borrower shall maintain and keep proper books of record and accounts in which full and true entries will be made of all dealings or transactions of or in relationship to all of the business affairs of the Borrower in accordance with generally acceptable accounting principles consistently applied. Borrower shall, at the request of the Lender, provide a position report to the Lender whenever requested by the Lender and shall additionally provide access to any and all of the financial records of Borrower when requested by the Lender.

8.2. *Inspection.* The Lender, or any Person designated by Lender in writing, shall have the right, from time to time hereafter, to call at the Borrower's place or places of business (or any other place where the Collateral or any information relating thereto is kept or located) during reasonable business hours, and, without hindrance or delay, (i) to inspect, audit, check and make copies of and extracts from the Borrower's

books, records, journals, orders, receipts and any correspondence and other data relating to the Borrower's business or to any transactions between the parties hereto, (ii) to make such verification concerning the Collateral as the Lender may consider reasonable under the circumstances, and (iii) to discuss the affairs, finances and business of the Borrower with any person or entity who, in good faith, claims to be a creditor of the Borrower.

8.3. *Conduct of Business.* Except as contemplated herein, the Borrower shall maintain in full force and effect all licenses, permits, bonds, franchises, lease, patents, contracts and other rights necessary or desirable to the profitable conduct of its business, shall continue in, and limits its operations to, the same general line of business as that presently conducted by it, and shall comply with all applicable laws and regulations of any federal, state or local governmental authority, except for such laws and regulations the violation of which would not, in the aggregate, have a material adverse effect on the Borrower's financial condition, results of operations or business.

8.4. *Maintenance of Property.* The Borrower shall keep the Collateral in good condition, repair and working order, normal wear and tear excepted, and shall not allow Borrower's chief place of business or any of the Collateral to be moved from its current locations without the written consent of Lender.

8.5. *Account Covenants.* The Borrower shall: (i) promptly upon the Borrower's learning thereof, inform the Lender, in writing, of any material delay in the Borrower's performance of any of its obligations to any Account Debtor or of any assertion of any claims, offsets or counterclaims by any Account Debtor; (ii) not permit or agree to any extension, compromise or settlement or make any changes or modification of any kind or nature with respect to any Account, including, without limitation, any of the terms relating thereto; and (iii) promptly upon the Borrower's learning thereof, furnish to and inform the

Lender of all material adverse information relating to the financial condition of any Account Debtor.

8.6. *Purpose of Loans.* The Borrower shall use the proceeds of all loans hereunder to finance its business operations. All loans hereunder shall be used by the Borrower for valid business purposes and in accordance only with purposes as specified to the Lender by Borrower.

8.7. *Claims and Taxes.* The Borrower agrees to indemnify and hold the Lender harmless from and against any and all claims, demands, liabilities, losses, damages, penalties, costs and expenses (including reasonable attorney's fees) relating to or in any way arising out of the possession, use, operation or control of any of the Borrower's assets. The Borrower shall pay or cause to be paid all license fees, bonding premiums and related taxes and charges, and shall pay or cause to be paid all of the Borrower's real and personal property taxes, assessments and charges and all of the Borrower's franchise, income, unemployment, use, excise, old age benefit, withholding, sales and other taxes and other governmental charges assessed against the Borrower, or payable by the Borrower, at such times and in such manner as to prevent any penalty from accruing or any lien or charge from attaching to its property, provided that the Borrower shall have the right to contest in good faith, by an appropriate proceeding promptly initiated and diligently conducted, the validity, amount or imposition of any such tax, and upon such good faith contest to delay or refuse payment thereof, if (i) the Borrower establishes adequate reserves to cover such contested taxes, and (ii) such contest does not have a material adverse effect on the financial condition of the Borrower, the ability of the Borrower to pay any of the Liabilities, or the priority or value of the Lender's security interest in the Collateral.

8.8. *Lender's Costs and Expenses as Additional Liabilities.* The Borrower shall reimburse the Lender for all expenses and fees paid or incurred in connection with the documentation,

negotiation and closing of the loan described herein, including, without limitation, filing and recording fees, title insurance premiums, and the reasonable fees and expenses of the Lender's attorneys, whether such expenses and fees are incurred prior to or after the closing date. All costs and expenses incurred by the Lender with respect to the negotiation, documentation, enforcement, collection and protection of the Lender's interest in the Collateral; shall be additional Liabilities of the Borrower to the Lender, payable on demand and secured by the Collateral.

8.9. *Borrower's Liability Insurance.* The Borrower shall maintain, at its expense, such public liability and property damage insurance as is ordinarily maintained by other companies in similar businesses, provided that in no event shall such public liability insurance be less than $1,000,000.00 per occurrence for personal injury and $500,000.00 per occurrence for property damage. The Borrower's public liability insurance may include a deductible of not more than $1,000.00 per occurrence. All such policies of insurance shall be in a form and with insurers normally recognized as adequate by prudent business persons.

8.10. *Borrower's Property Insurance.* The Borrower shall, at its expense, keep and maintain its assets insured for their full insurable value against loss or damage by fire, theft, explosion, spoilage and all other hazards and risks ordinarily insured against by other owners or users of such properties in similar businesses, and in no event shall said insurance coverage be less than the outstanding balances, including the principal and interest due by the Borrower to the Bank of Liabilities. All such policies of insurance shall be in form and with insurers normally recognized as adequate prudent business persons, and all such policies shall be in such amounts as may be satisfactory to the Lender. The Borrower shall deliver to the Lender the original (or a certified) copy of each policy of insurance and evidence of payment of all premiums therefore. Such policies of insurance shall contain an endorsement, in form and substance satisfac-

tory to the Lender, showing all loss payable to the Lender as provided below. Such endorsement, or an independent instrument furnished to the Lender, shall provide that such insurance company will give the Lender at least thirty (30) days' prior written notice before any such policy or policies of insurance shall be altered or cancelled and that no act or default of the Borrower or any other Person shall affect the right of the Lender to recover under such policy or policies of insurance in case of loss or damage. The Borrower hereby directs all insurers under such policies of insurance to pay all proceeds of insurance policies directly to the Lender. If the Borrower, at any time or times hereafter, shall fail to obtain or maintain any of the policies of insurance required above or to pay any premium in whole or in part relating thereto, then the Lender, without waiving or releasing any obligation or Default by the Borrower hereunder, may at any time or times hereafter (but shall be under no obligation to do so) obtain and maintain such policies of insurance and pay such premiums and take any other action with respect thereto which the Lender deems advisable.

8.11. *Notice of Suit or Adverse Change in Business.* The Borrower shall, as soon as possible, and in any event within five (5) days after the Borrower learns of the following, give written notice to the Lender of (i) any material proceeding(s) being instituted or threatened to be instituted by or against the Borrower in any federal, state, local or foreign court or before any commission or other regulatory body (federal, state, local or foreign), and (ii) any material adverse change in the business, assets or condition, financial or otherwise, of the Borrower.

8.12. *Indemnification.* If, at any time or times hereafter, there shall become effective any amendment to, deletion from or revision, modification or other change in any provision of any statute, or any rule, regulation or interpretation thereunder or any similar law or regulation, affecting the Lender's extension of credit described in this Agreement and/or the selling of participations therein, the Borrower shall indemnify and hold

the Lender harmless from and against any and all obligations, fees, liabilities, losses, penalties, costs, expenses, and damages, of every kind and nature, imposed upon or incurred by the Lender by reason of any such amendment, deletion, revision, modification or other change, whether or not the closing hereunder occurs.

8.13. *Inventory and Farm Products Records.* The Borrower now keeps and shall at all times hereafter keep correct and accurate records itemizing and describing the cost of operations of its businesses and all records shall be available during the Borrower's usual business hours on demand to any of the Lender's officers, employees or agents.

8.14. *Accounts Records and Verification Rights.* The Borrower now keeps and shall at all times hereafter keep correct and accurate records regarding the Accounts and the financial and payment records of the Account Debtors, all of which records shall be available during the Borrower's usual business hours on demand to any of the Lender's officers, employees or agents. Any of Lender's officers, employees or agents shall have the right at any time or times hereafter, in Lender's name, in the name of a fictional nominee or in the name of the Borrower to verify the validity, amount or any other matter relating to any Accounts by mail, telephone, telegraph or otherwise. The Borrower shall promptly notify the Lender of any amount due and owing in excess of $10,000.00 with respect to any Account Debtor which are in dispute for any reason.

8.15. Borrower and Lender agree that Borrower shall maintain all personal bank accounts, including but not limited to checking, savings, Certificates of Deposit and other forms of deposits available through the Bank with The First National Bank of Westville and the Sidell State Bank, as well as all operating accounts, including but not limited to checking, savings, Certificates of Deposit and other forms of deposits of the Borrower during the term of this agreement, except that Bor-

rower may continue to maintain their account with The First National Bank of Catlin, Catlin, Illinois, provided that during the term of this Finance Agreement Borrower will send a copy of the monthly statements summarizing the transaction with said account to Bank within ten (10) days of the receipt of said statements of account by Borrower. Borrower fully understands that the Bank retains all right of offset against any and all sums on deposit in said account or accounts.

9. *NEGATIVE COVENANTS.*

The Borrower covenants and agrees that so long as any Liabilities remain outstanding, and (even if there shall be no Liabilites outstanding) so long as the Lender remains committed hereunder (unless the Lender shall give its prior written consent thereto):

9.1. *Encumbrances.* Except as contemplated herein and except as set forth on Schedule 6 attached hereto, the Borrower will not create, incur, assume or suffer to exist any security interest, mortgage, pledge, lien or other encumbrance of any nature whatsoever on any of its assets, including, without limitation, the Collateral, other than: (i) liens securing the payment of taxes, either not yet due or the validity of which is being contested in good faith by appropriate proceedings, and as to which the Borrower shall, if appropriate under generally accepted accounting principles, have set aside on their books and records adequate reserves; (ii) deposits under workmen's compensation, unemployment insurance, social security and other similar laws, or to secure the performance of bids, tenders, contracts (other than for the repayment of borrowed money) or leases, or to secure indemnity, performance or other similar bonds for the performance of bids, tenders, contracts (other than for the repayment of borrowed money) or leases, or to secure statutory obligations or surety or appeal bonds, or to secure indemnity, performance or other similar bonds in the ordinary course of business, (iii) the lien and security interests in

favor of the Lender; and (iv) zoning restrictions, easements, licenses, covenants and other restrictions affecting the use of real property, and other liens and encumbrances on property, which do not, in the Lender's sole determination, (a) materially impair the use of such property, or (b) materially lessen the value of such property for the purposes for which the same is held by the Borrower.

9.2. *Consolidations, Mergers or Acquisitions.* The Borrower shall not incorporate, recapitalize or consolidate with, merge with, or otherwise acquire all or substantially all of the assets or properties of any other Person.

9.3. *Deposits, Investments or Loans.* The Borrower shall not make or permit to exist deposits, investments or loans (other than loans existing on the date of the execution of the Agreement and disclosed to the Lender on or prior to such date) in or to any other Person, except (i) investments in short-term direct obligations of the United States Government, (ii) investments in negotiable certificates of deposit issued by Lender or by any other bank satisfactory to the Lender, in its reasonable discretion payable to the order of the Borrower or to bearer, and (iii) deposits with Lender.

9.4. *Indebtedness.* Except as contemplated herein and except as set forth on Schedule 7 attached hereto, the Borrower shall not incur, create, assume, become or be liable in any manner with respect to, or permit to exist, any obligations or indebtedness, except (i) the Liabilities; (ii) obligations secured by liens or security interests described in subsection 9.1 above; and (iii) trade obligations and normal accruals in the ordinary course of business not yet due and payable, or with respect to which the Borrower is contesting in good faith the amount or validity thereof by appropriate proceedings, and then only to the extent that the Borrower has set aside on its books adequate reserves therefor, if appropriate under generally accepted accounting principles.

9.5. *Guarantees.* Except as contemplated herein and except as set forth on Schedule 8 attached hereto, the Borrower shall not guarantee, endorse, or otherwise in any way become or be responsible for obligations of any other Person, whether by agreement to purchase the indebtedness of any other Person or through the purchase of goods, supplies, or services, or maintenance of working capital or other balance sheet covenants or conditions, or by way of stock purchase, capital contribution, advance or loan for the purpose of paying or discharging any indebtedness or obligation of such other Person or otherwise, except endorsements of negotiable instruments for collection in the ordinary course of business.

9.6. *Disposal of Property.* Except as set forth on Schedule 9 attached hereto, the Borrower shall not sell, lease, transfer, or otherwise dispose of any of its properties, assets and rights to any Person except in the ordinary course of business.

9.7. *Capital Investment Limitations.* The Borrower shall not purchase, invest in or otherwise acquire additional real estate, machinery, equipment, or other fixed assets, totalling more than $15,000.00 in cost for calendar year 1985.

10. *DEFAULT, RIGHTS AND REMEDIES OF THE LENDER.*

10.1. *Liabilities.* In the event a Default shall exist or occur, any or all of the Liabilities may, at the option of the Lender, and without demand or notice of any kind, be declared, and thereupon shall become, immediately due and payable.

10.2 *Rights and Remedies Generally.* In the event of a Default, the Lender shall have, in addition to any other rights and remedies contained in this Agreement or in any of the other Financing Agreements, all of the rights and remedies of a secured party under the Code or other applicable laws, all of which rights and remedies shall be cumulative, and none exclusive, to the extent permitted by law. In addition to all such

rights and remedies, the sale, lease or other disposition of the Collateral, or any part thereof, by the Lender after Default may be for cash, credit or any combination thereof, and the Lender may purchase all or any part of the Collateral at public or, if permitted by law, private sale, and in lieu of actual payment of such purchase price, may set-off the amount of such purchase price against the Liabilities then owing. Any sales of the Collateral may involve the sale of portions of the Collateral at different times, and at different locations, and may, at Lender's option, be held at a site different from the site where the Collateral (or any part thereof) is located; any such sales, at Lender's option, may be in conjunction with or separate from the foreclosure on any real property Collateral and may be adjourned from time to time with or without notice. The Lender may, in its sole discretion, cause the Collateral to remain on the Borrower's premises, at Borrower's expense, pending sale or other disposition of the Collateral. The Lender shall have the right to conduct such sales on the Borrower's premises, at Borrower's expense, or elsewhere, on such occasion or occasions as the Lender may see fit.

10.3. *Entry upon Premises.* In the event of a Default, the Lender shall have the right to enter upon the premises of the Borrower where the Collateral is located (or is believed to be located) without any obligation to pay rent to the Borrower, or any other place or places where the Collateral is believed to be located and kept, and remove the Collateral therefrom to the premises of the Lender or any agent of the Lender, for such time as the Lender may desire, in order effectively to collect or liquidate the Collateral, and/or the Lender may require the Borrower to assemble the Collateral and make it available to the Lender at a place or places to be designated by the Lender. Borrower expressly agrees that Lender may, if necessary to gain occupancy to the premises where the Equipment and Farm Products are located, without further notice to Borrower, (i) hire Borrower's employees to assist in the loading and transporta-

tion of such Collateral, (ii) utilize Borrower's Equipment in such operation, (iii) cut or otherwise temporarily move or remove any barbed-wire or other fencing or similar boundary-maintenance devices, and (iv) pick or otherwise render inoperative any locks on gates to barns, pastures or other property not customarily habitated by people; Borrower agrees that any such actions authorized by this sentence shall be deemed to have been authorized and not a breach of the peace if the Lender takes reasonable efforts to safeguard all of Borrower's property (e.g. by re-stringing any barbed-wire fences or re-locking gates in a manner that continues to allow Borrower the use of the gates).

10.4. *Sale or Other Disposition of Collateral by the Lender.* Any notice required to be given by the Lender of a sale, lease or other disposition or other intended action by the Lender with respect to any of the Collateral which is deposited in the United States mails, postage prepaid and duly addressed to the Borrower at the address specified in subsection 11.11 below, at least ten (10) business days prior to such proposed action shall constitute fair and reasonable notice to the Borrower of any such action. The net proceeds realized by the Lender upon any such sale or other disposition, after deduction for the expense of retaking, holding, preparing for sale, selling or the like and the reasonable attorney's fees and legal expenses incurred by the Lender in connection therewith, shall be applied as provided herein toward satisfaction of the Liabilities. The Lender shall account to the Borrower for any surplus realized upon such sale or other disposition, and the Borrower shall remain liable for any deficiency. The commencement of any action, legal or equitable, or the rendering of any judgment or decree for any deficiency shall not affect the Lender's security interest in the Collateral until the Liabilities are fully paid.

10.5. *Dishonor of Checks.* The Lender shall have the right, in accordance with law, to dishonor checks drawn on deposit accounts maintained by the Borrower with the Lender. If a

Default is existing, the Lender shall have the absolute right, in its sole discretion, to dishonor checks drawn on such deposit accounts and to hold such deposit accounts as cash collateral to secure the payment of the Liabilities. Notwithstanding the foregoing, nothing contained herein shall interfere with the Lender's right under common law to set-off the balances of any such deposit account against the Liabilities.

10.6. *Waiver of Demand.* Demand, presentment, protest and notice of nonpayment are hereby waived by the Borrower. The Borrower also waives the benefit of all valuation, appraisal and exemption laws.

11. *MISCELLANEOUS.*

11.1. *Payments.* For purposes of determining the amount of Liabilities, including the computations of interest which may from time to time be owing to the Lender, the receipt of any check or any other item of payment by Lender shall be treated as a payment on account of the Liabilities until such check or other item of payment is actually paid in cash or cash equivalent. The Lender is hereby authorized, at Lender's sole discretion, to debit the Borrower's demand accounts or other accounts with the Lender from time to time to satisfy that portion of the Liabilities which are then due and owing.

11.2. *Costs and Attorney's Fees.* If at any time or times hereafter the Lender employs counsel in connnection with protecting or perfecting the Lender's security interest in the Collateral or in conneciton with any matters contemplated by or arising out of this Agreement, whether (a) to commence, defend or intervene in any litigation or to file a petition, complaint, answer, motion or other pleadings, (b) to take any other action in or with respect to any suit or proceeding (bankruptcy or otherwise), (c) to consult with officers of the Lender to advise the Lender or to draft documents for the Lender in connection with any of the foregoing or in connection with any proposed extension or refinancing of the Liabilities, (d) to protect, col-

lect, lease, sell, take possession of, or liquidate any of the Collateral, or (e) to attempt to enforce or to enforce any security interest in any of the Collateral, or to enforce any rights of the Lender to collect any of the Liabilities; then in any of such events, all of the reasonable attorneys' fees arising from such services, and any expenses, costs and charges relating thereto, including, without limitation, all fees of all paralegals and other staff employed by such attorneys, together with interest at the rate prescribed in Section 3 above, shall be part of the Liabilities, payable on demand and secured by the Collateral.

11.3. *Expenditures by the Lender.* In the event the Borrower shall fail to pay taxes, insurance, assessments, costs or expenses which the Borrower is, under any of the terms hereof, required to pay, or fails to keep the Collateral free from other security interests, liens or encumbrances, except as permitted herein, the Lender may, in its sole discretion, make expenditures for any or all of such purposes, and the amount so expended, together with interest thereon at the rate prescribed in Section 3 above, shall be part of the Liabilities, payable on demand and secured by the Collateral.

11.4. *Custody and Preservation of Collateral.* The Lender shall be deemed to have exercised reasonable care in the custody and preservation of any of the Collateral in its possession if it takes such action for that purpose as the Borrower shall request in writing, but failure by Lender to comply with any such request shall not of itself be deemed a failure to exercise reasonable care, and no failure by Lender to preserve or protect any right with respect to such Collateral against prior parties, or to do any act with respect to the preservation of such Collateral not so requested by the Borrower, shall of itself be deemed a failure to exercise reasonable care in the custody or preservation of such Collateral.

11.5. *Reliance by the Lender.* All covenants, agreements, representations, and warranties made herein by the Borrower

shall, notwithstanding any investigation by the Lender, be deemed to be material to and to have been relied upon by the Lender.

11.6. *Parties.* Whenever in this Agreement there is reference made to any of the parties hereto, such reference shall be deemed to include, wherever applicable, a reference to the successors and assigns of the Borrower and the successors and assigns of the Lender.

11.7. *Applicable Law; Severability.* This Agreement shall be construed in all respects in accordance with, and governed by, the laws and decisions of the State of Illinois. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions or the remaining provisions of this Agreement.

11.8. *Application of Payments.* Notwithstanding any contrary provision contained in this Agreement or in any of the other Financing Agreements, the Borrower irrevocably waives the right to direct the application of any and all payments at any time or times hereafter received by the Lender from the Borrower or with respect to any of the Collateral, and the Borrower does hereby irrevocably agree that the Lender shall have the continuing exclusive right to apply and reapply any and all payments received at any time or times hereafter, whether with respect to the Collateral or otherwise, against the Liabilities in such manner as the Lender may deem advisable, notwithstanding any entry by any of the Lender upon any of its books and records.

11.9. *Marshalling; Payments Set Aside.* The Lender shall be under no obligation to marshall any assets in favor of the Borrower or against or in payment of any or all of the Liabilities.

To the extent that the Borrower makes a payment or payments to the Lender or Lender enforces its security interests or excercises its rights of setoff, and such payment or payments or the proceeds of such enforcement or setoff or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, state or federal law, common law or equitable cause, then to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such enforcement or setoff had not occurred.

11.10. *Continuing Effect.* This Agreement, the Lender's security interests in the Collateral, and all of the promissory notes and security agreements shall continue in full force and effect so long as any Liabilities shall be owed to the Lender, and (even if there shall be no Liabilities outstanding) as long as the Lender remains committed hereunder.

11.11. *Notice.* Except as otherwise expressly provided herein, any notice required or desired to be served, given or delivered hereunder shall be in writing, and shall be deemed to have been validly served, given or delivered three (3) days after deposit in the United States mails, with proper postage prepaid, addressed to the party to be notified as follows:

(i) If to the Lender at:

The First National Bank of Westville
101 East Main Street
Westville, IL 61833
Attn: Its President

with a copy to:

Timothy O. Smith
Lowenstein, Hubbard and Smith
2 East Main Street - Towne Centre
Danville, IL 61832

(ii) If to the Borrower at:

Big D Seed Company
Catlin, IL 61817
Attn: Mr. Robert S. Davis

and

Davis Hybrid Corn Company
Catlin, IL 61817
Attn: Robert S. Davis

and

Davis Seed Farms
Catlin, IL 61817
Attn: Robert S. Davis

and

Robert S. Davis and
Virginia M. Davis
405 West Third Street
Homer, IL 61849

or to such other address as each party designates in writing to the other in the manner herein prescribed.

11.12. *Waiver.* The Lender's failure, at any time or times hereafter, to require strict performance by the Borrower of any provision of this Agreement shall not waive, affect or diminish any right of the Lender thereafter to demand strict compliance and performance therewith. Any suspension or waiver by the Lender of a Default by the Borrower under this Agreement or any of the other Financing Agreements shall not suspend, waive or affect any other Default by the Borrower under this Agreement or any of the other Financing Agreements, whether the same is prior or subsequent thereto and whether of the same or of a different kind of character. None of the undertakings, agreements, warranties, covenants and representations of the

Borrower contained in this Agreement or any of the other Financing Agreements and no Default by the Borrower under this Agreement or any of the other Financing Agreements shall be deemed to have been suspended or waived by the Lender unless such suspension or waiver is in writing signed by an officer of the Lender, and directed to the Borrower specifying such suspension or waiver.

12. *Sale of Business.* Borrower and Lender further agree that Borrower and all persons claiming an interest in Big D Seed Company, Davis Seed Farm, a partnership, and Robert S. Davis, doing business as Davis Hybrid Corn Company, shall enter into a contract or contracts by executing and delivering to and receiving an executed contract or contracts from a good faith buyer or buyers on or prior to September 1, 1985, with a closing date of not later than July 31, 1986, of a sufficient number of the assets of BIG D SEED COMPANY, DAVIS HYBRID CORN COMPANY and DAVIS SEED FARMS in which the Bank holds a security interest which sale shall at a minimum generate all funds necessary on the date of closing to pay to the Bank all accrued interest and principal on all notes which Borrower owes to the Bank, but that said contract or contracts shall be on such terms and conditions as are acceptable to the Borrower subject to the generation of funds necessary to pay off the Bank in full of all balances due and owing on all of the liabilities of Borrower to Bank. Borrower agrees to execute and deliver to The First National Bank of Danville, Danville, Illinois, as Trustee, at the same time this Finance Agreement is executed and delivered by the Borrower all documents necessary to effectuate the transfer of all of the assets in which Lender claims a security interest pursuant to the terms of this agreement or any prior security agreement in which Lender holds an interest and which secures all of the loans of the Borrower to the Lender. Said Trustee shall hold such documents as the escrow agent with no charge to the parties hereto. Borrower and Lender further agree that if the Borrower has not entered into a contract of sale referred to above on or prior to September 1, 1985, then the

Lender shall, in its sole discretion, deliver a notice on or after September 2, 1985, to The First National Bank of Danville, Danville, Illinois, as Trustee, and Borrower at the addresses in Section 11.11, directing said Trustee to deliver such documents transferring any and all interests that Borrower may have in such property and assets to The First National Bank of Westville, Westville, Illinois, in order to effectuate the transfer of all such interests of the Borrower in said property to The First National Bank of Westville, Westville, Illinois, in accordance with its security interests therein. Upon receipt of any and all documents of transfer, the Lender shall dispose of such property in accordance with the terms of this agreement regarding disposition of collateral securing said loans referred to herein and shall apply any proceeds received from the sale of such collateral in accordance with the terms of this agreement and other financing agreements between the Bank and Borrower. Borrower acknowledges that if upon the disposition of such collateral there is a balance due and owing on the liabilities referred to in this agreement, then Borrower in accordance with the terms and conditions of this agreement and all of said notes will remain liable for any deficiency due on said promissory notes in accordance with the laws of the State of Illinois.

13. Borrower and Bank further agree that all of the liabilities and any renewals thereof referred to in this Fianance Agreement including those incorporated into this agreement by Paragraph 1 hereunder are hereby amended in their terms and conditions of default to provide that said promissory notes shall be in default if "Borrower fails to enter into a contract or contracts by executing and delivering to and receiving an executed contract or contracts from a good faith buyer or buyers on or prior to September 1, 1985, with a closing date not later than July 31, 1986, of a sufficient number of the assets of BIG D SEED COMPANY, DAVIS HYBRID CORN COMPANY and DAVIS SEED FARMS in which the Banks holds a security interest which sale shall at a minimum generate all funds necessary on the date of closing to pay to the Bank all accrued interest and

principal on all notes which Borrower owes to the Bank, but that said contract or contracts shall be on such terms and conditions as are acceptable to the Borrower subject to the generation of funds necessary to pay off the Bank in full of all balances due and owing on all of the liabilities of Borrower to Bank." The parties hereto agree that such an amendment be, and is, hereby effectuated and made a part of all of such promissory notes currently owned by Lender referred to in this agreement.

14. Borrower agrees that they shall at the request of Lender immediately provide details to the Lender regarding the negotiations and status of the Borrower's efforts in the sale of the assets as required by this agreement. At Lender's request, Borrower shall provide copies of all documents regarding the negotiations and terms and conditions of any proposed sale of the assets of the three enterprises referred to in this agreement and Lender agrees to keep the report of such terms and conditions confidential.

15. This agreement is binding upon the heirs, executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the day and year first above written.

THE FIRST NATIONAL BANK
OF WESTVILLE,
Westville, Illinois

By /s/ T.R. McDowell, President
Authorized Officer

Bank/Lender

BIG D SEED COMPANY

By /s/ Robert S. Davis
Its President

(Corporate Seal)

DAVIS SEED FARMS

By /s/ Robert S. Davis
Robert S. Davis, Partner

By_____
William R. Davis, Partner

DAVIS HYBRID CORN COMPANY

By /s/ Robert S. Davis
Robert S. Davis, Proprietor

/s/ Robert S. Davis
ROBERT S. DAVIS,
Individually

_____
VIRGINIA M. DAVIS,
Individually

Davis/Borrower

APPENDIX D

CHEATLE DEPOSITION

[3] LESLIE CHEATLE,

being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BISBEE:

Q Please state your name, sir?

A Leslie N. Cheatle, Junior.

Q Are you employed?

A Yes.

Q What's your occupation?

A President and Chief Executive Officer, First National Bank of Danville.

Q How long have you been employed in that capacity, Mr. Cheatle?

A Four and a half years.

Q What was your employment prior to that time?

A Vice President and Trust Officer, same bank.

Q How long have you been employed at the First National Bank of Danville?

A Since May of 1979.

Q What was your employment prior to then?

A Trust Officer with the old Second National Bank of Aurora.

[25]

Q What was said in that respect and by whom?

A By all of us present that, you know, there was a rather dramatic over the last several years, you know, severe and sustained operating losses, that the collateral values had continued to deteriorate, and that the — it did not appear that the company was going to be able to sustain itself, and that if we allowed the loans to go on and just continue to renew and renew and renew that the banks would suffer severe losses.

Q All right. Prior to this time, prior to January 1984, had Bob Davis in any of his capacities ever been in default to your bank to your knowledge?

A Not to my knowledge.

Q All. right. Have you ever been advised by McDowell that he'd ever been in default to any of McDowell's banks?

A Not to my knowledge.

Q Did you have any information at hand to the effect that Bob Davis was a poor credit risk?

A Yes..

Q What information did you have in that respect?

A Reports prepared by his C.P.A., reports prepared by Bob, statements that Bob made.

Q Okay. Those reports, however, simply showed that his company was in a weakened financial position, is that not . . .

Supreme Court, U.S.
FILED
JUN 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT DAVIS, VIRGINIA DAVIS, WILLIAM DAVIS, DYNAMIC GENES, INC., A DELAWARE CORPORATION, F/K/A BIG D SEED CO., A DELAWARE CORPORATION, DAVIS HYBRID CORN CO., AND DAVIS SEED FARMS,

PETITIONERS,

VS.

FIRST NATIONAL BANK OF WESTVILLE, A NATIONAL BANKING ASSOCIATION AND FIRST NATIONAL BANK OF DANVILLE, A NATIONAL BANKING ASSOCIATION,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

F. Daniel Welsch*
WELSCH & HALL
712 West Fairchild St.
Danville, Illinois 61832
(217)446-0773

*Counsel of Record

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OCTOBER TERM, 1988

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PETITIONERS,

VS.

FIRST NATIONAL BANK OF WESTVILLE, A NATIONAL BANKING ASSOCIATION AND FIRST NATIONAL BANK OF DANVILLE, A NATIONAL BANKING ASSOCIATION,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The Petitioners' statement of the case misstates the facts in two particulars. First, the complained of requirement in the loan agreement does

not require liquidation of the business within sixty days. It requires that they enter into a contract within 60 days which would require liquidation within approximately one year. Second, Petitioners state that they had never been in default, whereas the record cited for this statement shows that they were not in default prior to January, 1984, i.e. approximately 18 months before the execution of the loan agreement. The recitals in the loan agreement acknowledge that the Petitioners had been in default by reason of non-payment of matured notes for four months prior to the loan agreement. (See maturity dates on notes as compared to the date of execution of the loan agreement. A-13, A-16) The Petitioners had not been technically in default prior to January, 1984, because the banks had repeatedly renewed existing loans despite dramatic

recurrent sustained and severe operating losses over a period of years. A-51

ARGUMENT

The loan was intended to provide the Petitioners with short-term operating capital so they would have an opportunity to sell the business assets, which constituted collateral for the loan, as a going business, which, it was hoped by both parties, would result in a realization of more money to apply to the debt. The alternative was a judicial sale through foreclosure or bankruptcy. It had become obvious to the banks that the business could not sustain itself and the only source of repayment of the large existing debt as well as the new loan was the sale of the assets. A-51 The credit requirement of liquidation of assets was no more than an effort by the banks to protect their investment.

The Petitioners appear to misapprehend what both the District Court and the Circuit Court of Appeals have held. Neither held that the Petitioners as Plaintiffs, must show that the act of the banks complained of had an anti-competitive effect on commerce. Both Courts stated the practice complained of was "in no way anti-competitive", i.e. it was not anti-competitive in nature.

The Petitioners overlook or ignore the distinction between the anti-competitive nature of a practice as opposed to the anti-competitive effect of a practice. If the act of a bank complained of can conceivably lessen competition, a Plaintiff who prosecutes a 1972 claim need not show, by specific instance, that the practice did in fact lessen competition to some degree. On the other hand, if the act of a bank

complained of could not conceivably lessen competition, then such act cannot constitute a violation of Sec. 1972 because this law is intended only to prohibit anti-competitive practices. It is only common sense to realize that if a practice is not of the nature contemplated by the purpose of the act then it is not violative of the act. To hold otherwise would be absurd. Banks would be unable to know what the law required or what practices would constitute a violation of the act. The prohibition of an act must be reasonably clear so that the persons regulated may know what is expected of them.

Respectfully Submitted,

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